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Thomas A Edison Papers

A SELECTIVE MICROFILM EDITION

PART IV
(1899-1910)

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at
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**Legal Department Records
Motion Pictures - Case Files**

***Greater New York Film Rental Company v.
Motion Picture Patents Company et al.***

***Greater New York Film Rental Company v.
General Film Company et al.***

This folder contains material pertaining to suits brought by the Greater New York Film Rental Co. against the Motion Picture Patents Co. (MPPCo) and the General Film Co. in the State of New York and in the federal courts. Other defendants included Thomas A. Edison, Inc., the Edison Manufacturing Co., the American Mutoscope & Biograph Co., and other manufacturers licensed by MPPCo. The cases were initiated in 1911 and 1914 and involved disputes over licenses and allegations of monopoly against MPPCo and the General Film Co. The selected items are primarily from a printed record in the state case: *Summons, Complaint, Affidavits, Injunction and Order to Show Cause*. Several pages bear marginal notations by Edison. Also included are a few letters regarding the eventual settlement of the federal suit by decree in 1916. Among the items not selected are writs and pleadings; correspondence relating to legal fees and the progress of litigation; and other letters to and from the defendant companies.

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See records in book
is also the paid sheet
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Legal
Box
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Supreme Court of the State of New York,
NEW YORK COUNTY.

GREATER NEW YORK FILM RENTAL COMPANY,

Plaintiff,

against

MOTION PICTURE PATENTS COMPANY and others,

Defendants.

SUMMONS, COMPLAINT, AFFIDAVITS,
INJUNCTION AND ORDER
TO SHOW CAUSE.

ROGERS & ROGERS,

Attorneys for Plaintiff,

Office and Post Office Address,

No. 180 Broadway,

Borough of Manhattan,

New York City.

SAMUEL UNTERMYER,

Of Counsel.

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Supreme Court of the State of New York,

NEW YORK COUNTY.

GREATER NEW YORK FILM RENTAL
COMPANY,
Plaintiff,

against

MOTION PICTURE PATENTS COM-
PANY, General Film Company,
American Mutoscope & Bio-
graph Company, Edison Man-
ufacturing Company, Essanay
Film Manufacturing Com-
pany, Kalem Company, George
Kleine, Lubin Manufacturing
Company, Pathe Freres, Selig
Polycope Company, Vita-
graph Company of America,
and Melles Manufacturing
Company,

Defendants.

At Chambers,
New York
County,
December 16,
1911.

It appearing to my satisfaction, by the annexed
complaint, verified December 16, 1911, and by the
annexed affidavits of William Fox, verified on the
same day, James J. Lodge, verified December 15,
1911, William H. Swanson, Louis Rosenbluh, Ab-

4 (Injunction Order and Order to Show Cause.)

raham Carlos and Samuel P. Weissmann, each verified on the same day, and Gustavus A. Rogers, verified December 16, 1911, that the plaintiff prays for and is entitled to judgment against the defendants, restraining the commission of the acts hereinafter enjoined, and that the commission of such acts during the pendency of this action would produce irreparable injury to the plaintiff, and render the judgment ineffectual; and that the defendants, during the pendency of this action, are doing and are about to do and procure and suffer to be done, the acts hereinafter mentioned, in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, such acts consisting of an attempted cancellation of the plaintiff's license and of intended and threatened discontinuance of the supply of motion picture films to the plaintiff, which it has heretofore received and is entitled to receive, and of interference and threatened interference with the plaintiff's business and customers, tending to the destruction of the plaintiff's business; and that the plaintiff is entitled to an injunction restraining the cancellation of his license and the impairment or discontinuance of the aforesaid service to the plaintiff, and all interference with its business and customers upon the grounds that the plaintiff is entitled, both by virtue of its license and the other contracts set forth in the complaint, and by virtue of the facts alleged in the complaint and accompanying affidavits, to receive from the defendants, pursuant to the duty resting upon them and arising out of the facts set forth, continued, un-

(Injunction Order and Order to Show Cause.) 7

impaired and efficient service, as heretofore, of motion picture films; and that the defendants threaten and are about to interfere with and cut off the plaintiff's supply of such films, and otherwise to interfere with and destroy the plaintiff's business; and that the plaintiff has no adequate remedy at law, and is without other remedy than the injunction prayed for in the complaint; and the plaintiff having given the security provided by law;

Now, on motion of Rogers & Rogers, attorneys 8 for the plaintiff;

It is ordered, that the defendants, and each of them, and their and each of their officers, directors, attorneys, agents and servants, be and they hereby are enjoined and restrained, until the further order of this Court, from interfering with the plaintiff's business, or from discriminating against it, or from ceasing to supply the plaintiff, without delay or discrimination, with motion picture films produced by the defendants designated as licensed manufacturers, respectively, upon the plaintiff's orders, upon the plaintiff's paying for such films and continuing to perform the conditions of its license, Exhibit A, and from in any wise altering, to the plaintiff's prejudice, in completeness and promptness of service, or otherwise, the methods of business heretofore and now prevailing between the plaintiff and the defendants designated as licensed manufacturers; from taking from the plaintiff's possession or that of any customer or exhibitor, or in any wise interfering with, by means of actions of replevin, or otherwise, any of the film possessed by the plaintiff; from interfering with the plaintiff's busi-

10 (Injunction Order and Order to Show Cause.)

ness or customers, and from attempting to alienate or entice said customers from the plaintiff; and from cancelling or attempting to cancel the plaintiff's license, Exhibit A, or from in any wise interfering with the plaintiff's business, or from requiring or inducing the defendants designated as licensed manufacturers, or any of them, to cut off, limit, or in any wise make less efficient than heretofore, the supply of films by said licensed manufacturers, respectively, to the plaintiff, or from in any wise interfering with the business relations hitherto and now existing between the plaintiff and said licensed manufacturers.

The plaintiff is hereby given leave to serve additional papers in support of its motion to continue this injunction *pendente lite*, on or before December 19, 1911.

Let the defendants show cause at a Special Term, Part I, of this Court, appointed to be held at the New York County Court House in the Borough of Manhattan, City of New York, on the 20 day of December, 1911, at the opening of Court on that day, or as soon thereafter as counsel can be heard, why a rule or order should not be made continuing this injunction during the pendency of this action; and why the plaintiff should not have such other, further or different relief as may seem good to the Court.

Let a copy of the summons and complaint herein and of the aforesaid affidavits, together with a copy of this order, be served upon the defendants not later than December 18, 1911; and such service shall be sufficient.

December 16, 1911.

JOHN FORD,
Justice Supreme Court.

SUPREME COURT OF THE STATE OF NEW YORK, 13

NEW YORK COUNTY.

GREATER NEW YORK FILM RENTAL
COMPANY,

Plaintiff,

against

MOTION PICTURE PATENTS COMPANY, GENERAL FILM COMPANY, AMERICAN MOTOSCOPE & BIOGRAPH COMPANY, EDISON MANUFACTURING COMPANY, EBANAY FILM MANUFACTURING COMPANY, KALEM COMPANY, GEORGE KLEINE, LUBIN MANUFACTURING COMPANY, PATHE FRERES, SILEM POLYSCOPE COMPANY, VITAGRAPH COMPANY OF AMERICA and MELES MANUFACTURING COMPANY,

Defendants.

Summons.

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To the above-named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken

(Summons.)

16 against you by default, for the relief demanded
in the complaint.

Trial desired in New York County.

Dated, New York, December 16, 1911.

ROGERS & ROGERS,
Attorneys for Plaintiff,
Office and Post Office Address:
No. 120 Broadway,
Borough of Manhattan,
New York City.

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SUPREME COURT OF THE STATE OF
NEW YORK.

NEW YORK COUNTY.

GREATER NEW YORK FILM RENTAL
COMPANY,

Plaintiff,

against

MOTION PICTURE PATENTS COM-
PANY, GENERAL FILM COMPANY,
AMERICAN Mutoscope & Bio-
graph Company, Edison Manu-
facturing Company, Essanay
Film Manufacturing Com-
pany, Kalem Company,
George Kleine, Lubin Manu-
facturing Company, Pathe
Freres, Selig Polaskoff Com-
pany, Vitagraph Company of
America and Miles Manu-
facturing Company,

Defendants.

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The plaintiff, by Rogers & Rogers, its attorneys,
complains of the defendants, and alleges as fol-
lows:

FIRST: The plaintiff is, and since March, 1907,
has been, a domestic corporation, having its office
and principal place of business in the Borough of
Manhattan, City of New York, and engaged as a
rental agency in leasing to exhibitors in said City
of New York and elsewhere in the State of New

(Complaint.)

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York, and in the States of New Jersey, Connecticut and Massachusetts, motion picture films for use in projecting machines, together with such projecting machines and appliances, for the purpose of enabling exhibitors to give motion picture exhibitions in the manner hereinafter more fully described. The term "rental agency," as herein used, means an individual, partnership or corporation, which, since the organization of the defendant Motion Picture Patents Company in or about December, 1908, after first obtaining a license from said Patents Company, leases motion picture films from certain manufacturers (hereinafter referred to as licensed manufacturers) licensed by said Patents Company and operating by virtue of such licenses under the patents owned by said Patents Company, and hereinafter more fully described, and in turn sub-lets such films, together with projecting machines and appliances purchased from various sources, such machines being first licensed by said Patents Company, to exhibitors who are licensed by said Patents Company, for the purpose of enabling the exhibitors to give public exhibitions of motion pictures.

24

Succor: The defendant Motion Picture Patents Company (hereinafter referred to as the Patents Company) is, and since about December, 1908, has been, a foreign corporation, organized and existing under and pursuant to the laws of the State of New Jersey, and having its office and principal place of business in the Borough of Manhattan, City of New York. It is the owner of all the patents hereinafter described for motion picture films, cameras and parts thereof, and

(Complaint.)

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projecting machines and parts thereof, and is, and ever since its organization has been, engaged in licensing certain manufacturers to make such films under said patents, and also to import films from foreign countries, and in licensing other manufacturers to construct projecting machines, and in licensing film rental agencies, which by means of such licenses are enabled to obtain films from said licensed manufacturers.

(c) The defendant General Film Company is, and since April 21, 1910, has been, a foreign corporation, organized and existing under and pursuant to the laws of the State of Maine, and having its principal office and place of business in the Borough of Manhattan, City of New York. It is, and since its organization has been, engaged in business as a rental agency, holding a license as such agency from said Patents Company, and leasing motion picture films from the aforesaid licensed manufacturers, and in turn leasing such films, together with projecting machines and appliances, to exhibitors in the State of New York and elsewhere and throughout the United States and Canada.

27

(b) The defendant American Mutoscope & Biograph Company is, and at all times hereinafter mentioned was, a foreign corporation, organized and existing under and pursuant to the laws of the State of New Jersey, and having its office and principal place of business in the Borough of Manhattan, City of New York, and engaged as one of the aforesaid licensed manufacturers, holding a license from said Patents Company, in manufacturing motion picture films, and in leasing

(Complaint.)

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the same to licensed rental agencies in the State of New York and elsewhere and throughout the United States and Canada.

(e) The defendant Edison Manufacturing Company is, and at all times hereinafter mentioned has been, a foreign corporation, organized and existing under and pursuant to the laws of the State of New Jersey, and having an office and carrying on business in the Borough of Manhattan, City of New York, and engaged, among other things, as one of the aforesaid licensed manufacturers, holding a license from said Patents Company, in manufacturing and leasing motion picture films to licensed rental agencies in the State of New York and elsewhere and throughout the United States and Canada.

(d) The defendant Essanay Film Manufacturing Company is, and at all times hereinafter mentioned has been, a foreign corporation, organized and existing under and pursuant to the laws of the State of Illinois, and engaged, since December, 1908, as one of the aforesaid licensed manufacturers, holding a license from said Patents Company, in manufacturing and leasing motion picture films to licensed rental agencies in the State of New York and elsewhere and throughout the United States and Canada.

(e) The defendant Kalem Company is, and at all times hereinafter mentioned has been, a domestic corporation, engaged, since December, 1908, as one of the aforesaid licensed manufacturers, holding a license from said Patents Company,

(Complaint.)

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in manufacturing and leasing motion picture films to licensed rental agencies in the State of New York and elsewhere and throughout the United States and Canada.

(f) The defendant George Kleine is, and since December, 1908, has been, one of the licensed manufacturers aforesaid, holding a license from said Patents Company, and engaged in importing and leasing motion picture films to licensed rental agencies in the State of New York and elsewhere and throughout the United States and Canada.

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(g) The defendant Lubin Manufacturing Company is, and at all times hereinafter mentioned has been, a foreign corporation, organized and existing under and pursuant to the laws of the State of Pennsylvania, and engaged, since December, 1908, as one of the aforesaid licensed manufacturers, holding a license from said Patents Company, in manufacturing and leasing motion picture films to licensed rental agencies in the State of New York and elsewhere and throughout the United States and Canada.

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(h) The defendant Pathé Freres is, and at all times hereinafter mentioned has been, a foreign corporation, organized and existing under and pursuant to the laws of the State of New Jersey, having an office and carrying on business in the Borough of Manhattan, City of New York, and engaged, since December, 1908, as one of the aforesaid licensed manufacturers, holding a license from said Patents Company, in manufacturing and leasing motion picture films to licensed rental agencies in the State of New York and

(Complaint.)

34 elsewhere and throughout the United States and Canada.

(i) The defendant Solig Polyscope Company is, and at all times hereinafter mentioned has been, a foreign corporation, organized and existing under and pursuant to the laws of the State of Illinois, and engaged, since December, 1908, as one of the aforesaid licensed manufacturers, holding a license from said Patents Company, in manufacturing and leasing motion picture films to licensed rental agencies in the State of New York and elsewhere and throughout the United States and Canada.

(j) The defendant Vitagraph Company of America is, and at all times hereinafter mentioned has been, a domestic corporation, and engaged, since December, 1908, as one of the aforesaid licensed manufacturers, holding a license from said Patents Company, in manufacturing and leasing motion picture films to licensed rental agencies in the State of New York and elsewhere and throughout the United States and Canada.

36 (k) The defendant Melies Manufacturing Company is, and since about July, 1910, has been, a domestic corporation, and engaged as one of the aforesaid licensed manufacturers holding a license from said Patents Company, in manufacturing and leasing motion picture films to licensed rental agencies in the State of New York and elsewhere throughout the United States and Canada.

(l) All of the aforesaid defendants, except Motion Picture Patents Company and General Film

(Complaint.)

Company, are herein collectively referred to as the licensed manufacturers.

Turno: The business of manufacturing films and projecting machines for the purpose of exhibiting motion pictures has, during a period of about ten years past, become one of great extent and importance in the United States and Canada and in foreign countries, and during the past four or five years has developed to vast proportions, involving the investment of many millions of dollars. Every city and village and almost every hamlet in the land has moving picture shows, which have proved a means of amusement, recreation and education at small cost to great numbers of people. Such shows are constantly increasing in popularity, and new theatres and other places of entertainment, for the purpose of showing such pictures, are constantly being established throughout the United States. Such exhibitions have also proved of great value for educational purposes, and are used in schools and colleges, and the photographing of moving objects upon the films hereinafter described has proved valuable in scientific research, and is being increasingly used for such purposes.

FOURTH: Prior to December, 1908, when the Patents Company was organized, letters patent of the United States, covering cameras, with which moving pictures were taken, and the negative films upon which the photographs were made, and the positive films to which the pictures were transferred, and the projecting machines by means of which the pictures upon the films were magnified and thrown upon screens, and relating generally

(Complaint.)

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to improvements in the motion picture art, were owned and controlled by three of the defendants hereinbefore described as licensed manufacturers to wit: The Edison Manufacturing Company, the American Mutoscope and Biograph Company, and the Vitagraph Company of America, and by the Armat Moving Picture Machine Company. Said owners, and other of the licensed manufacturers operating under licenses, manufactured and sold apparatus and films covered by said patents, and still other of the defendant manufacturers disregarded and denied the validity of said patents and carried on business despite them.

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(e) The patents so owned and controlled by said defendants and said Armat Company were the following:

No. 578185, dated March 2, 1897, for Vitascopes, granted to Thomas Armat;

No. 580749, dated April 13, 1897, for Vitascopes, granted to Thomas Armat;

No. 580933, dated July 20, 1897, for Phonoscopes, granted to Charles F. Jenkins and

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Thomas Armat;

No. 588916, dated August 24, 1897, for Kinetoscopes granted to Charles M. Campbell, as assignee of Willard G. Steward and Ellis F. Frost;

No. 673323, dated April 30, 1901, for Kinetoscopes, granted to the American Vitagraph Company, as assignee of Albert E. Smith;

No. 673892, dated May 14, 1901, for Vitascopes, granted to Thomas Armat;

No. 707934, dated August 26, 1902, for Projecting Kinetoscopes, granted to E. & H. T. Anthony & Co., as assignees of Woodville Latham;

(Complaint.)

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No. 722382, dated March 10, 1903, for Animated Picture Apparatus, granted to American Mutoscope & Biograph Co., as assignee of John A. Frost;

No. 744251, dated November 17, 1903, for Kinetoscope, granted to Albert E. Smith;

No. 770937, dated September 27, 1904, for Kinetoscopes, granted to the Vitagraph Company of America, as assignee of Albert E. Smith;

No. 771280, dated October 4, 1904, for Winding Reel, granted to Albert E. Smith;

No. 785326, dated March 21, 1905, for Flammable Shield for Kinetoscope, granted to the Vitagraph Company of America, as assignee of William Ellwood;

No. 785237, dated March 21, 1905, for Film-Holder for Kinetoscope, granted to the Vitagraph Company of America, as assignee of Albert E. Smith;

Reissued letters patent Nos. 12037 and 12038, dated September 30, 1902, issued to Thomas A. Edison, in place of original letters patent No. 589168, dated August 31, 1897, issued to said Thomas A. Edison, for a new and useful improvement in Kinetoscopic cameras;

Reissued letters patent No. 121192, dated January 12, 1904, issued to Thomas A. Edison, in place of original letters patent No. 589168, dated August 31, 1897, issued to said Thomas A. Edison, for Kinetoscopic film.

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(b) Each of the aforesaid patents was granted for the term of seventeen years from the date of issue of the original patent; and the plaintiff alleges, upon information and belief, that said patents collectively embraced the entire art of photo-

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graphing moving objects, the cameras with which such photographs were taken, the films upon which photographs were made, and those to which they were transferred, and the projecting machines and appliances by means of which the pictures were shown.

FURTHER: Prior to the organization of the Patents Company in December, 1908, the defendants herein designated as licensed manufacturers carried on their business independently, each competing with all of the others in the manufacture and sale of their aforesaid products, and there was actual and active competition throughout the United States among all of said defendants. During said period of competition, said defendants sold their products, and particularly their films, outright to concerns like the rental agencies hereinbefore described, which in turn leased the apparatus and films purchased by them to exhibitors throughout the United States and Canada. Said defendants designated as licensed manufacturers, also, during said period of competition, imported from foreign countries large quantities of film there manufactured, and sold the same to such rental agencies for distribution by lease to exhibitors throughout the United States. Said rental agencies purchased outright, and became the absolute owners of, the film sold to them by said defendants designated as licensed manufacturers.

(a) The apparatus and films were manufactured and sold by the manufacturers in various states, to wit: New York, Pennsylvania, Illinois, and other states, and such films were also imported into the United States from foreign countries;

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and all such films, domestic and foreign, were sold in and transported to all the States and Territories of the United States, and into the Dominion of Canada; and the sale and transportation thereof constituted interstate and foreign commerce.

(b) The rental agencies leased such apparatus and films to exhibitors in all the States and Territories and in Canada; and such leasing and the transportation of such apparatus and films constituted interstate and foreign commerce.

(c) During said period of competition, a large number of such rental agencies, as aforesaid (except that they were free and independent and not licensed or subject to control), was established throughout the United States, carrying on business as hereinbefore described; and, in the Borough of Manhattan, City of New York, down to the spring of 1909, when the defendant Patents Company was in active operation, there were upwards of twenty such rental agencies actively competing with one another for the business of leasing apparatus and films to exhibitors in the City of New York and vicinity, and elsewhere in the State of New York and in the United States.

(d) The result of the aforesaid competition among the defendants designated as licensed manufacturers was to improve the product of the manufacturers and to keep down the cost thereof to the rental agencies; and the effect of the competition among the rental agencies was to improve the service given and keep down the cost to the exhibitors.

(Complaint.)

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SIXTH: In December, 1908, the defendant Patents Company was organized, as aforesaid, for the purpose of stifling and suppressing the existing competition among the manufacturers herein designated as licensed manufacturers, and to combine said licensed manufacturers into or subject them to the control of a single corporation, which should acquire the ownership of all of the aforesaid letters patent; and with the ultimate object of extinguishing, also, competition among the aforesaid rental agencies throughout the United States, and driving said rental agencies out of business, and bringing the entire business of furnishing apparatus and films to exhibitors within the grasp of said Patents Company and those interested therein and who had brought about its organization.

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SEVENTH: Immediately after the organization of the Patents Company, all of the aforesaid letters patent were assigned to it by the respective owners thereof, and said Patents Company thereupon became the sole owner of all of said letters patent and of all rights thereunder, and possessed the sole and exclusive right to manufacture and sell the aforesaid apparatus and films for the production and exhibition of motion pictures.

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(c) The plaintiff further alleges, upon information and belief, that, shortly after the organization of said Patents Company, representatives of the defendants herein designated as licensed manufacturers and representatives of said Patents Company met in the Borough of Manhattan, City of New York, and formed a combination for the suppression of competition in the manufac-

(Complaint.)

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ture and sale of the aforesaid apparatus and films and in intrastate and interstate and foreign trade and commerce therein, and, pursuant to the agreement then and there made, of some of the details of which the plaintiff is not informed, all of the aforesaid letters patent were assigned and transferred to said Patents Company, and each of said licensed manufacturers entered into a license agreement with said Patents Company, by which each of said licensed manufacturers covenanted and agreed only to lease, and not to sell, in the United States or its territories or possessions (except its insular possessions and Alaska), motion picture films manufactured or imported by said licensed manufacturers, respectively, of a width greater than approximately one inch, and under the condition and restriction that said films should be used only on exhibiting and projecting machines licensed by said Patents Company under letters patent owned by it.

56

(b) The motion picture films therefore and since manufactured by said licensed manufacturers, and used for exhibition purposes, were and are of a width greater than approximately one inch.

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(c) In and by said license agreement, said Patents Company granted to each of said licensed manufacturers the right and license, for the United States, its territories and possessions, to manufacture and sell motion picture exhibiting or projecting machines, embodying one or more of the inventions described and claimed in certain of the letters patent hereinbefore mentioned; and said Patents Company released each licensee from

(Complaint.)

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liability for profits and damages by reason of prior infringement.

(d) In and by said license agreement, the licensee admitted the validity of the letters patent described therein, to wit: Numbers 578185, 580749, 580953, 588016, 673329, 673002, 707934, 722382, 744251, 770397, 771280, 785205, and 785237; the validity of some or all of which had theretofore been questioned and had been in litigation among the respective owners of said letters patent and between some or all of such owners and other of the defendants herein designated as licensed manufacturers.

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(e) In and by said license agreement, each licensee covenanted and agreed, that on all motion picture exhibiting or projecting machines containing one or more of the inventions described and claimed in letters patent numbers 673329, 744251, 770397, 771280, 785205, and 785237, made in the United States, its territories and possessions, by the licensee, and sold during the operation of the license, the licensee would pay certain fixed royalties; and that every motion picture exhibiting or projecting machine capable of exhibiting or projecting, by transmitted light, motion pictures on a film of approximately greater width than one inch, and embodying one or more of the inventions described and claimed in letters patent numbers 578185, 580749, 580953, 588016, 673329, 673002, 707934, 722382, 744251, 770397, 771280, 785205, and 785237, made in the United States, its territories or possessions, by the licensee, should be sold by the licensee, except when sold for export, under the restric-

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(Complaint.)

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tion and condition that such exhibiting or projecting machines should be used solely for exhibiting or projecting motion pictures containing the inventions of reissued letters patent number 12192, leased by a licensee of the Patents Company and upon other terms to be fixed by said Patents Company and complied with by the user, which other terms should be only the payment of a royalty or rental to the Patents Company while in use. It was further covenanted, that each licensee would attach in a conspicuous place, to each exhibiting or projecting machine of the licensee's manufacture, sold by it, except for export, a plate showing plainly not only the dates of the letters patent under which the machine was licensed, but also the following words and figures:

"Serial No.

Patented.

No.

"The sale and purchase of this machine gives only the right to use it solely with moving pictures containing the invention of reissued patent No. 12192, leased by a licensee of the Motion Picture Patents Company, the owner of the above patents and reissued patent, while it covers said patents, and upon other terms to be fixed by the Motion Picture Patents Company and to be complied with by the user while it is in use and while the Motion Picture Patents Company owns said patents. The removal or defacement of this plate terminates the right to use this machine."

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(f) In and by said license agreement, each licensee further covenanted that every motion picture exhibiting or projecting machine not capable

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of exhibiting or projecting, by transmitted light, motion pictures on a film of a width greater than approximately one inch, or capable of exhibiting or projecting motion pictures on film of any width, but only with reflected light, and embodying one or more of the inventions described and claimed in letters patent numbers 378185, 580749, 580953, 588916, 673329, 673992, 707034, 722382, 744251, 770037, 771280, 789205, and 789237, and made in the United States, its territories and possessions, by the licensee, should be sold by the licensee, except when sold for export, under the restriction and condition that said machine should be used in exhibiting or projecting motion pictures only in places to which no admission fee should be charged; and that the licensee would attach in a conspicuous place to every such machine a plate showing not only the dates of the letters patent under which said machine was licensed, but also the following words and figures:

"Patented.

No.

"The sale and purchase of this machine gives only the right to use it so long as this plate is not removed or defaced and in places to which no admission fee is charged."

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(g) In and by said license agreement, each licensee further covenanted not to make or sell repair parts for motion picture exhibiting or projecting machines manufactured or imported and sold by any other person, firm or corporation licensed by the Patents Company to manufacture or import and sell such machines under all or any of the United States letters patent herein last above mentioned by numbers; and further cove-

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nanted not to sell any exhibiting or projecting machine at less than the licensee's list price, except to jobbers and other persons, firms or corporations for the purpose of resale, and that the licensee would require such jobbers and other persons, firms and corporations to sell such machines at not less than the licensee's list price, except a discount of two per cent. for payment in ten days; and further covenanted not to sell, after May 1, 1909, any exhibiting or projecting machine capable of exhibiting or projecting by transmitted light motion pictures on a film of a width greater than approximately one inch, at a less list price than one hundred and fifty dollars (\$150), which might include various designated attachments, and that complete machines might be sold between February 1, 1909, and May 1, 1909, at a less list price than one hundred and fifty dollars (\$150), but only to persons, firms or corporations not engaged in the business of renting motion picture films, and not for use in any permanent or fixed place of exhibition.

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(h) In and by said license agreement, it was further agreed, that the Patents Company might grant other licenses to manufacture or import and sell exhibiting or projecting machines under any or all of the United States letters patent herein last above mentioned by numbers, said licenses to be in writing, and not to be granted or continued under terms, conditions or stipulations in any respect more favorable to such licensees than those set forth in said license agreement, except three named concerns, including the defendant Edison Manufacturing Company and said Armat Company, none of which should pay

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any royalties on machines embodying any or all of the inventions described and claimed in letters patent numbers 578185, 580749, 586953, 588916, 673802, 707234, and 722382, when such machines should be sold *bona fide* for export, unless such machines should also embody one or more of the inventions described and claimed in letters patent numbers 673329, 744251, 770937, 771280, 789205, and 785237, in which case a fixed royalty for each such machine should be paid.

71 (f) In and by said license agreement, it was further mutually agreed, between the Patents Company and each licensee, that the license agreement should take effect on February 1, 1909, and continue until June 20, 1910, with the option to the licensee to renew the agreement and license thereafter from year to year upon the same terms, conditions and stipulations, by giving notice to the licensor on or before March 20th in each year, beginning with the year 1910, and that thereupon the license should be deemed renewed for the period of one year, beginning June 20th of the year following such notice, and that such notice might be given by the licensee during the life or lives of each or all of the patents under which the licensee was by said agreement licensed.

72 (g) In and by said license agreement, it was further mutually agreed, that the agreement might be terminated during the original term, or any renewal period, if either party should knowingly or through gross neglect or carelessness be guilty of breach, violation or non-performance of its covenants, conditions and stipulations, resulting in substantial injury to the other party,

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and should, for the period of forty days after notice thereof from the other party, persist therein or fail to repair the same. Reparation, however, within such period of forty days should not prevent termination of the agreement if thereafter the guilty party should knowingly or through gross neglect or carelessness be guilty of a second breach, resulting in substantial injury to the other party.

74 **REPLY:** The plaintiff further alleges, upon information and belief, that each of said licensed agreements has been renewed, pursuant to the provisions thereof, from year to year, and is still in full force and effect, and that the intention of the Patents Company and said licensed manufacturers is to continue said license agreements in force and effect during the life of the patent owned by said Patents Company which is latest to expire.

75 (a) Soon after this combination of licensed manufacturers with said Patents Company was formed, competition among said licensed manufacturers ceased and they very substantially increased the prices thereof prevailing for the films made by them and have ever since maintained such increased prices, and now intend a further increase.

REPLY: Shortly after the organization of the Patents Company, and in January, 1909, and after the aforesaid combination between the Patents Company and the licensed manufacturers had been effected, and the aforesaid patents transferred to the Patents Company, and the

aforesaid license agreements between the Patents Company and said licensed manufacturers had been entered into, a meeting was called at the Borough of Manhattan, City of New York, by the Patents Company, and the aforesaid licensed manufacturers, to which representatives of all the principal rental agencies throughout the United States, about 120 in number, including the plaintiff, were invited. A large number of such representatives, including a representative of the plaintiff, attended said meeting, and were then and there informed in outline of the arrangements that had been effected between the Patents Company and the licensed manufacturers, and of the intention of said Patents Company and licensed manufacturers to reduce the number of rental agencies in the United States, and to require all such rental agencies as might be permitted to continue business to accept licenses from said Patents Company, granting such rental agencies the privilege of leasing, but not purchasing, films from the licensed manufacturers, and so others, and in turn of leasing such films and licensed machines and apparatus to such exhibitors throughout the United States and Canada as should be licensed by said Patents Company, and as would agree not to use any other motion picture films than those manufactured by the licensed manufacturers under the license of the Patents Company, or any other exhibiting or projecting machines or apparatus than those licensed by the Patents Company, and would pay a license fee to said Patents Company on each machine. Further requirements on the part of the exhibitors, as hereinafter stated, were required to be exacted by the rental agencies.

(a) The representatives of said rental agencies protested against the scheme as unjust and oppressive, but the representatives of the Patents Company and of the licensed manufacturers insisted that the rental agencies must choose between accepting licenses from the Patents Company and operating under the restrictions thereby imposed, or retiring from the motion picture business altogether. Thereupon, after much discussion, the rental agencies, being helpless and unable to obtain satisfactory films or apparatus, except by the means dictated by the Patents Company and the licensed manufacturers, reluctantly acquiesced, and a considerable number of such rental agencies throughout the United States, including the plaintiff, accepted license agreements, identical in terms, from the Patents Company.

(b) The number of rental agencies in the Borough of Manhattan, City of New York, was arbitrarily reduced by the Patents Company and the licensed manufacturers from upwards of twenty to nine, the Patents Company, with the concurrence of the licensed manufacturers, refusing to license more than nine agencies in said Borough of Manhattan; and the Patents Company and the licensed manufacturers largely reduced the number of rental agencies throughout the United States, by refusing to license a number of such rental agencies with which the licensed manufacturers had theretofore dealt for a number of years. The number of agencies in the United States was reduced from about one hundred and twenty to about seventy-five.

TENTH: Thereupon, on January 20, 1909, an agreement, known as an "Exchange License

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Agreement," was entered into between the plaintiff and the defendant Patents Company. A copy of said agreement, marked Exhibit A, is hereto annexed and made part of this complaint. At and before the time of the execution of said Exhibit A, it was mutually understood and agreed, between the plaintiff and the defendant Patents Company, that said license agreement, Exhibit A, should continue during the unexpired term of reissued letters patent number 12192, unless sooner terminated for cause, pursuant to the provisions of Paragraph 19 of said agreement.

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(a) The plaintiff entered into said license agreement under compulsion, because it could not otherwise obtain licensed machines or licensed film, both of which were essential to its business. The plaintiff further alleges, upon information and belief, that while certain unlicensed manufacturers were and are engaged in producing both machines and film, most or all of such machines have failed to comply with the requirements of the New York Board of Underwriters and of the Department of Water Supply, Gas and Electricity of the City of New York, and therefore cannot legally be used in public exhibitions in the City of New York. The films produced by such unlicensed manufacturers were, and still are, inferior, both in range of subjects and in perfection of the scenes photographed, to the films produced by the aforesaid licensed manufacturers; the unlicensed films have not, until recently, been produced in quantities sufficient for the plaintiff's business; and there has been, and still is, litigation in the Circuit Courts of the United States between the Patents Company, as complainant, and the un-

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licensed manufacturers of machines and films, as defendants, in which it has been and is contended by the complainant that the machines and films produced by said unlicensed manufacturers infringe some or all of the aforesaid patents now owned by the Patents Company, and it never has been, since December, 1908, and is not now, safe or commercially practicable for the plaintiff or other rental agencies to use either the machines or the films produced by said unlicensed manufacturers, not only because such use would involve the users in litigation, but because, if the claims of the Patents Company should be sustained, the supply of unlicensed machines and films would be cut off.

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(b) In addition, the films produced by the unlicensed manufacturers have acquired no such degree of popularity as those produced by the licensed manufacturers, who, owing to the greater length of time during which they have carried on the business, have perfected their organization and methods of production to a degree not yet reached by the unlicensed manufacturers. The substitution of films produced by independent manufacturers would greatly prejudice the plaintiff's business and largely reduce its profits. The plaintiff has extensively advertised the superiority of the films produced by the licensed manufacturers over the unlicensed films, and has cultivated a large clientele patronizing a number of theatres in the City of New York and elsewhere in the State of New York and in other States, which are supplied with film by the plaintiff, to the superiority of said licensed films, and the failure of the plaintiff to furnish such licensed

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films and any attempt to deal in unlicensed films would result in practically the complete loss of the patronage of its present customers.

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ELEVENTH: The plaintiff, ever since its organization, has carried on the business of a rental agency, and has supplied machines and film to a large number of licensed exhibitors in the City of New York, elsewhere in the State of New York, and in the States of New Jersey, Connecticut and Massachusetts. The plaintiff supplies films to ten of the largest, best equipped and best patronized motion picture theatres in the City of New York, and which exhibit motion pictures to three hundred and fifty thousand (350,000) people in every week; and, in addition, to about ninety (90) other motion picture theatres in the City of New York, as well as to similar exhibitors in various places in the other States mentioned.

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(c) The plaintiff has a large investment in its plant and property, and has established a valuable good-will, all of which will be rendered worthless, if, by the threatened action of the defendants, the plaintiff should be unable to continue its business and supply licensed films as heretofore.

TWELFTH: One of the conditions of the plaintiff's aforesaid license agreement, Exhibit A, is that prescribed by Paragraph 9, to the effect that the plaintiff should, without receiving any payment therefor, return to each licensed manufacturer or importer, on the first day of every month, commencing seven months after February 1, 1900,

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the equivalent amount of positive motion picture film in running feet (not purchased or leased over twelve months before), and of the make of such licensed manufacturer or importer, equal to the amount of licensed motion pictures that was so leased during the seventh month preceding the day of each such return; and, pursuant to said requirement, the plaintiff has from time to time, since September, 1900, without receiving any compensation, returned large quantities of positive motion picture film to the defendants herein designated as licensed manufacturers, which the plaintiff had purchased and owned outright, of an actual value of upwards of one hundred thousand dollars (\$100,000), and the purchase price of which was upwards of three hundred thousand dollars (\$300,000).

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THIRTEENTH: The plaintiff has duly performed all the conditions of the aforesaid license agreement, Exhibit A, on its part to be performed.

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FOURTEENTH: The Patents Company, in addition to the royalties paid by the licensed manufacturers, as heretofore set forth, has received from or through each licensed rental agency, pursuant to the provisions of paragraph 12 of said license agreement, Exhibit A, a license fee of two dollars per week for each licensed projecting machine used by each licensed exhibitor. The plaintiff has paid to said Patents Company during the existence of the agreement, Exhibit A, upwards of Thirty thousand dollars (\$30,000) for such license fees required to be paid by exhibitors. In practice such exhibitors usually refused to pay such license fees, and plaintiff was compelled to pay

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the same. The plaintiff further alleges, upon information and belief, that since January, 1909, said Patents Company has received its license fees paid by virtue of similar provisions, under license agreements like Exhibit A, upwards of One million dollars (\$1,000,000).

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FIFTEENTH: The plaintiff further alleges, upon information and belief, that at or about the same time when the aforesaid license agreements were made between the Patents Company and the licensed manufacturers, a separate agreement was made and entered into between said Patents Company and said licensed manufacturers, by which for divers valuable considerations said licensed manufacturers undertook and agreed to and with said Patents Company that they, the said licensed manufacturers, would supply to all rental agencies licensed by said Patents Company, all films manufactured by said licensed manufacturers respectively, on payment by such licensed rental agencies of the prices fixed by said licensed manufacturers. The plaintiff further alleges, upon information and belief, that the said last-mentioned agreement ever since has been and still is in full force and effect and was made by the parties thereto for the benefit of such rental agencies, including the plaintiff, as might be licensed by said Patents Company, and to assure to said licensed rental agencies a source of supply of the aforesaid films, without which it would be impossible for such rental agencies to carry on business.

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(a) The plaintiff further alleges, upon information and belief, that at or about the same time as said last-mentioned agreement was made between

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said Patents Company and said licensed manufacturers, said Patents Company licensed certain manufacturers of projecting machines to manufacture the same and sell them to licensed rental agencies and licensed exhibitors, and entered into an agreement with said manufacturers, so licensed, of such projecting machines, whereby the latter undertook and agreed to and with said Patents Company, for the benefit of rental agencies and exhibitors licensed by said Patents Company, to furnish projecting machines to such licensed rental agencies and licensed exhibitors on payment of the price exacted by said manufacturers for said machines.

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(b) The manufacturers of projecting machines licensed by said Patents Company were limited to thirteen in number, although there were a number of other manufacturers of such machines, and each of the manufacturers so licensed agreed to pay a royalty to said Patents Company upon each machine manufactured and sold. The effect of such agreement with said manufacturers of projecting machines was to limit the source of supply of said machines and to aid the Patents Company in effectuating a monopoly of the motion picture business in all its branches. In fact, only five of the thirteen manufacturers so licensed are manufacturing or selling such machines.

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SIXTEENTH: The plaintiff ever since the execution of the license agreement, Exhibit A, has leased films from the defendants herein designated as licensed manufacturers, and all of the plaintiff's orders have hitherto been promptly executed and it has received in each week since January 20,

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1900, from eighteen to thirty-six reels of film containing photographs of new scenes or subjects, that quantity being the maximum output of the combined licensed manufacturers, and the plaintiff in turn has leased such film to various licensed exhibitors as hereinbefore mentioned.

SEVENTEENTH: The Patents Company in the early part of 1900 licensed nine rental agencies in the Borough of Manhattan, City of New York, under license agreements in all respects similar to the aforesaid agreement, Exhibit A, made with the plaintiff. Thereafter the defendant General Film Company was organized on or about April 21, 1910, for the purpose of carrying on the business of a rental agency; and the plaintiff alleges, upon information and belief, that said company was organized and is controlled by said Patents Company and said licensed manufacturers, and that said General Film Company and said Patents Company and said licensed manufacturers have common officers and directors, to wit:

101
102 FRANK L. DYER, President of Edison Manufacturing Company; President of the Patents Company; Director of the General Film Company;

H. N. MARVIN, President of American Mutoscope and Biograph Company; Vice-President of the Patents Company;

J. J. KENNEDY, Vice-President of American Mutoscope and Biograph Company; Treasurer of the Patents Company; President of the General Film Company;

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WILLIAM FELZER, Manager of a branch of the Edison Manufacturing Company; Secretary of the Patents Company;

J. A. BESSER, a Director of Pathe Freres; Treasurer of the General Film Company;

ALBERT E. SMITH, Treasurer of Vitagraph Company of America; Director of the General Film Company.

The Board of Directors of said General Film Company is composed of the following: Frank L. Dyer, George K. Spoor, Samuel Long, George Kleine, Siegmund Lubin, J. A. Herst, W. N. Selig, Albert E. Smith and J. J. Kennedy; of whom, in addition to those already mentioned, said Spoor is an officer and director of the defendant Essanay Film Manufacturing Company, one of the licensed manufacturers; said Long is an officer and director of the defendant Kalem Company, one of the licensed manufacturers; said Kleine is a licensed manufacturer; said Lubin is President and a director of the defendant Lubin Manufacturing Company, one of the licensed manufacturers; and said Selig is President and a director of the defendant Selig Polyscope Company, one of the licensed manufacturers.

(c) The plaintiff further alleges, upon information and belief, that the said General Film Company was organized as a part of and in furtherance of the combination and conspiracy to obtain control of and to monopolize all branches of the motion picture business and to restrain trade and commerce therein among the several States and

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with foreign nations; and that in furtherance of said object the licenses of two of the aforesaid nine licensed rental agencies formerly existing in the Borough of Manhattan, City of New York, were arbitrarily cancelled by said Patents Company and the business thereof transferred to said General Film Company, and of the remaining seven rental agencies the business and good will of six were purchased by said General Film Company, the owners of said rental agencies being coerced into making such sales by the arbitrary cancellation or threats of arbitrary cancellation of their licenses by the Patents Company, and said General Film Company has continued and carried on the business of said purchased rental agencies.

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(b) The plaintiff further alleges, upon information and belief, that prior to November 14, 1911, in furtherance of the aforesaid combination and conspiracy to obtain control of the motion picture business and to vest the control of the leasing and subleasing of films in said United States in said General Film Company, said Patents Company arbitrarily cancelled the licenses of a number of licensed rental agencies doing business in various parts of the United States, and by means of threats of such arbitrary cancellation compelled the sale of the business and good will of the remaining licensed rental agencies, except the plaintiff, to said General Film Company, which succeeded to and acquired and has ever since carried on the business of all of said licensed rental agencies so forced out of existence.

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(c) The plaintiff is the only remaining licensed agency carrying on business in the United States;

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and the plaintiff further alleges, upon information and belief, that said General Film Company supplies film for upwards of five hundred (500) motion picture theatres in the City of New York, which were formerly supplied by the aforesaid nine licensed agencies.

FOURTEENTH: Several months prior to November 14, 1911, the defendants Patents Company and General Film Company urged the plaintiff to sell to said General Film Company its business and good will and offered to pay One hundred thousand dollars (\$100,000) therefor, provided the plaintiff would surrender its aforesaid license agreement, Exhibit A, which offer the plaintiff refused.

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(d) On November 14, 1911 the defendant Patents Company served upon the plaintiff a notice of which the following is a copy:

"MOTION PICTURE PATENTS COMPANY,
80 Fifth Avenue, New York.

November 14th, 1911. 111

Greater New York Film Rental Company,
116 East 14th Street,
New York City.

Gentlemen:

Pursuant to the right reserved by this Company under the first clause of Section Nineteen of the Conditions of License forming a part of the Exchange License Agreement existing between you and this Company, and bearing date of the twentieth day of January, Nineteen hundred and nine, we

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hereby notify of our intention to terminate said license and that the same will terminate at eight o'clock A. M. on Monday the fourth day of December, Nineteen hundred and eleven, unless sooner terminated by this Company for any breach of the conditions of said license.

Yours truly,
MOTION PICTURE PATENTS COMPANY,
By H. N. MARVIN
Vice-President."

113 (b) Thereafter a conference was had between the President of the plaintiff and the aforesaid J. A. Berst, a director of the defendant Pathe Freres, and Treasurer of said General Film Company. Said Berst informed the President of the plaintiff that the reason for the aforesaid notice of cancellation was that the Patents Company and the licensed manufacturers and the General Film Company had determined to increase the price to be charged by said licensed manufacturers for film, and that so long as the plaintiff held its license such price could not be increased and said licensed manufacturers could not obtain complete control of the motion picture business, which they desired to obtain. Said Berst finally undertook, if the plaintiff would surrender its license without opposition, to attempt to influence his associates in the Patents Company and the General Film Company to make an offer to the plaintiff for the purchase of its business and good will.

(c) Shortly thereafter at a conference between the plaintiff's President and the aforesaid J. J. Kennedy, Treasurer of the Patents Company and

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President of said General Film Company, said Kennedy, acting, the plaintiff alleges, upon information and belief, in behalf of both of said companies and of said licensed manufacturers, after first insisting that the plaintiff had nothing to sell, inasmuch as its license had been cancelled, finally offered to reinstate said license and to pay the plaintiff Ninety thousand dollars (\$90,000) for its business and good will, provided the same should be transferred to the General Film Company together with the lease of the premises occupied by the plaintiff at 116 East 14th Street in the Borough of Manhattan, City of New York, on or before eight A.M. on December 11, 1911. The plaintiff's President suggested that such papers as were desired by Mr. Kennedy to be executed by the plaintiff, be prepared and sent to the plaintiff for examination by its counsel, and thereupon said Kennedy telephoned to the aforesaid H. N. Marvin and directed him to send to the plaintiff a notice of withdrawal of the notice of cancellation of November 14, 1911.

(d) Thereafter, on or about December 2, 1911, the plaintiff received from said Patents Company a notice of which the following is a copy: 117

"MOTION PICTURE PATENTS COMPANY,
80 FIFTH AVENUE, NEW YORK.

December 1st, 1911.

GREATER NEW YORK FILM RENTAL COMPANY,
116 East 14th Street,
New York City.

Gentlemen:

Referring to our letter of November 14th, notifying you of our intention to terminate

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your license on the fourth day of December, Nineteen hundred and eleven, we hereby notify you that said notice of termination is hereby withdrawn.

Yours truly,
MOTION PICTURE PATENTS COMPANY,
By H. N. Marvin Vice Pres."

(c) Thereafter on or about December 7, 1911, the plaintiff notified said Kennedy that it would not sell its business or surrender its license, and immediately thereafter the plaintiff received from said Patents Company a notice of which the following is a copy:

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"MOTION PICTURE PATENTS COMPANY,
80 Fifth Avenue, New York.

December 7th, 1911.

GREATER NEW YORK FILM RENTAL COMPANY,
116 East 14th Street,
New York City, N. Y.

Gentlemen:

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Pursuant to the right reserved by this Company under the first clause of Section Nineteen of the Conditions of License forming part of the Exchange License Agreement existing between you and this Company and bearing date the eighteenth day of January, Nineteen hundred and nine, we hereby notify you of our intention to terminate said license and that the same will terminate at eight o'clock A. M. on Monday the twenty-fifth day of December, Nineteen hundred and eleven, unless sooner terminated by this Company for any breach of the conditions of said license.

Yours truly,
MOTION PICTURE PATENTS COMPANY,
By H. N. Marvin, Vice President."

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(f) The plaintiff further alleges, upon information and belief, that the threatened cancellation of the plaintiff's license is a part of the aforesaid conspiracy among the defendants to restrain trade and commerce among the several states and with foreign nations in the motion picture business and particularly in the supply of films and apparatus, and to monopolize and obtain complete and exclusive control of the motion picture business in the United States and Canada.

NINETEENTH.—The plaintiff further alleges, upon information and belief, that the defendants, even if restrained from cancelling the plaintiff's license, will seek to accomplish the same object and eliminate the plaintiff from the motion picture business by means of withholding from the plaintiff the supply of films which it has heretofore received from the licensed manufacturers, or to cripple and destroy the plaintiff's said business by discriminating against the plaintiff in supplying such film. It is essential to the success of the plaintiff's business that films containing photographs of new scenes and subjects be promptly supplied by said licensed manufacturers, without discrimination, as heretofore, in order that it may be able to compete with the General Film Company in the distribution of such films to exhibitors.

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TWENTIETH: The plaintiff further alleges, upon information and belief, that the defendants' threatened refusal to deal with the plaintiff and to supply it with films produced by the licensed manufacturers under patents owned by the defendant Patents Company, is in violation of the duty owing by the defendants to the plaintiff, and

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to the public generally, and in violation of the plaintiff's contract rights, by virtue of the plaintiff's aforesaid license, Exhibit A, and the other contracts mentioned in this complaint; and that the organization of the defendant Patents Company, and the assignment to it of the aforesaid letters patent, and the licenses and agreements existing between said Patents Company and said licensed manufacturers, and the organization of the defendant General Film Company, and its control by said Patents Company and said licensed manufacturers, and the methods of business pursued by all the defendants, constitute a contract, combination and conspiracy in restraint of trade and commerce among the several States and with foreign nations, and an attempt to monopolize, and a combination and conspiracy among all the defendants to monopolize, the trade and commerce among the several States and with foreign nations in motion picture apparatus and films and in the motion picture business generally; and that such contract, combination and conspiracy and attempt to monopolize are in violation of an Act of Congress of the United States, approved July 2, 1890, commonly known as the Sherman Anti-Trust Act, which provides as follows:

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"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand

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and dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SECTION 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

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(e) The plaintiff has heretofore, since January 20, 1909, dealt and still continues to deal with all of the defendants designated as licensed manufacturers, and has leased large quantities of films from each of them, and uninterrupted continuance of the supply of such films from each of said defendants is essential to the plaintiff's business. Said defendants, the licensed manufacturers, will cut off the plaintiff's supply of films if the plaintiff's license should be cancelled, or, even without such cancellation, if instructed so to do by said Patents Company, or by agreement among themselves for the purpose of forcing the plaintiff to retire from business as a rental agency. It will be impossible for the plaintiff to secure adequate service from the licensed manufacturers, such as the plaintiff requires for the successful carrying on of its business, and such as it has heretofore had, without the aid of the injunction of this Court.

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TWENTY-FIRST: The plaintiff has no full, adequate or complete remedy at law for the griev-

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ances herein set forth and is relievable only in a court of equity where matters of this sort are properly cognizable and relievable. The plaintiff's damages cannot be measured in money or ascertained at law.

WHEREFORE, the plaintiff prays for a decree:

(1) Restraining the defendants, and each of them, and their and each of their officers, directors, attorneys, agents and servants, during the life of reassued letters patent number 12192, from interfering with the plaintiff's business, or from discriminating against it, or from ceasing to supply the plaintiff, without delay or discrimination, with motion picture films produced by the defendants, designated as licensed manufacturers, respectively, upon the plaintiff's orders, upon the plaintiff's paying for such films and continuing to perform the conditions of its license, Exhibit A; and enjoining and restraining said defendants, their officers, directors, attorneys, agents and servants, from in any wise altering, to the plaintiff's prejudice, in completeness and promptness of service, or otherwise, the methods of business heretofore and now prevailing between the plaintiff and the defendants designated as licensed manufacturers;

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(2) Enjoining and restraining the defendants, and each of them, and their and each of their officers, directors, attorneys, agents and servants, from taking from the plaintiff's possession or that of any customer or exhibitor, or in any wise interfering with, by means of actions of replevin, or otherwise, any of the film possessed by the

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plaintiff; and restraining the defendants, and particularly the General Film Company, its officers, directors, attorneys, agents and servants, from interfering with the plaintiff's business or customers, and from attempting to alienate or entice said customers from the plaintiff;

(3) Enjoining and restraining the defendant Patents Company, its officers, directors, attorneys and agents, during the life of said reassued letters patent number 12192, from cancelling or attempting to cancel the plaintiff's license, Exhibit A, or from in any wise interfering with the plaintiff's business, or from requiring or inducing the defendants designated as licensed manufacturers, or any of them, to cut off, limit, or in any wise make less efficient than heretofore, the supply of films by said licensed manufacturers, respectively, to the plaintiff, or from in any wise interfering with the business relations hitherto and now existing between the plaintiff and said licensed manufacturers; and the plaintiff prays that an order may be made restraining the defendants as hereinbefore prayed, during the pendency of this action.

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(4) Declaring the plaintiff's license in full force and effect, and not subject to cancellation, except for the plaintiff's breach of some condition or stipulation in said license contained, during the life of said reassued letters patent number 12192;

(5) Declaring void and of no effect the attempted cancellation of said license made by the defendant Patents Company on December 7, 1911;

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(c) For such other, further or different relief in the premises as may be agreeable to equity and soon meet to the Court; besides the costs of this action.

ROGERS & ROGERS,
Attorneys for Plaintiff,
Office and Post Office Address:
No. 160 Broadway,
Borough of Manhattan,
New York City.

137 SAMUEL USTERMYER,
Of Counsel.

State and County of New York, ss.:

WILLIAM FOX, being duly sworn, says:

I am an officer, to wit: President, of the plaintiff, which is a domestic corporation.

138 I have read the foregoing complaint and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

WILLIAM FOX.

Sworn to before me this
16th day of December, 1911.

RAFAEL BRILL,
Notary Public,
New York County.

(Complaint—Exhibit A.)

Exhibit A.**EXCHANGE LICENSE AGREEMENT.**

WHEREAS, the MOTION PICTURE PATENTS COMPANY of New York City (hereinafter referred to as the "Licensor") is the owner of all the right, title and interest in and to reissued Letters Patent No. 12,192, dated January 12, 1902, granted to Thomas A. Edison, for Kinetoscopic Film, and also Letters Patent Nos. 578,185, 580,740, 586,953, 588,916, 673,329, 673,992, 707,934, 722,382, 744, 751, 770,537, 771,280, 785,205 and 785,237, for inventions relating to motion picture projecting machines; and

WHEREAS, The Licensor has licensed the American Autoscope and Biograph Company of New York City; the Edison Manufacturing Company of Orange, New Jersey; the Essanay Company of Chicago; the Kalem Company of New York City; George Kleine of Chicago; Lubin Manufacturing Company of Philadelphia; Pathe Freres of New York City; the Selig Polyscope Company of Chicago; and the Vitagraph Company of America, of New York City, (hereinafter referred to as "Licensed Manufacturers or Importers") to manufacture or import motion pictures under the said reissued Letters Patent and to lease licensed motion pictures (hereinafter referred to as "Licensed Motion Pictures") for use on projecting machines licensed by the Licensor; and

WHEREAS, the undersigned, (hereinafter referred to as the "Licensee") desires to obtain a license under said reissued Letters Patent No. 12,

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192, to lease from the Licensed Manufacturers and Importers licensed motion pictures and to sub-let the said licensed motion pictures for use on projecting machines licensed by the Licensor;

Now, THEREFORE, THE PARTIES HERETO, in consideration of the covenants herein, have agreed as follows:

(1) The Licensor hereby grants to the Licensee for the term and subject to the conditions expressed in the "Conditions of License" hereinafter set forth, the license, under the said reassued Letters Patent No. 12,192, to lease licensed motion pictures from the Licensed Manufacturers and Importers and to sub-lease said license motion pictures for use only on projecting machines licensed by the Licensor under Letters Patent owned by it.

(2) The Licensee covenants and agrees to conform with and strictly adhere to and be bound by all of the "Conditions of License" hereinafter set forth, and to and by any and all future changes in or additions thereto, and further agrees not to do or suffer any of the acts or things thereby prohibited, and that the Licensor may place and publish the Licensee's name in its removal or suspended list in the event of the termination of this agreement by the Licensor, or in case of any violation thereof, and may direct the Licensed Manufacturers and Importers not to lease licensed motion pictures to the Licensee, the Licensee hereby expressly agreeing that such Licensed Manufacturers and Importers shall have the right to cease such leasing when so directed by the Licensor;

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and the Licensee further agrees that the signing of this agreement constitutes a cancellation of any or all agreements for the sale of licensed motion pictures made prior to this agreement by and between the Licensee and any or all licensed manufacturers or importers, except as to any clause in said agreements relating to the return of motion picture film to the several licensed manufacturers or importers. It is further understood and agreed by the Licensee that the license hereby granted is a personal one and not transferable or assignable, and the Licensee hereby recognizes and acknowledges the validity of the said reassued Letters Patent No. 12,192.

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CONDITIONS OF LICENSE.

1. From the date of this agreement the Licensee shall not buy, lease, rent, or otherwise obtain any motion pictures other than licensed motion pictures and shall dispose of any motion pictures only by the sub-letting thereof under the conditions hereinafter set forth.

2. The ownership of each licensed motion picture leased under this agreement shall remain in the Licensed Manufacturer or Importer from whom it may have been leased, the Licensee, by the payment of the leasing price acquiring only the license to sub-let such motion picture subject to the conditions of this agreement. Such license for any motion picture shall terminate upon the breach of this agreement in regard thereto, and the Licensed Manufacturer or Importer from whom it may have been leased shall have the right to immediate possession of such motion picture,

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without liability for any leasing price or other sum, which the Licensee, or the person in whose possession said motion picture is found, may have paid therefor.

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3. The Licensee shall not sell nor exhibit licensed motion pictures obtained from any Licensed Manufacturer or Importer, either in the United States or elsewhere, but shall only sub-let such licensed motion pictures [and only for use in the United States and its territories]* and only to exhibitors who shall exclusively exhibit licensed motion pictures, but in no case shall the exhibitor be permitted to sell or sub-let or otherwise dispose of said licensed motion pictures.

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4. The leasing price to be paid by the Licensee to the Licensed Manufacturers or Importers, or the terms of payment for or shipment of licensed motion pictures, shall in no case be less or more favorable to the Licensee than that defined in the leasing schedule embodied in this agreement, or any other substitute leasing schedule, which may be regularly adopted by the Licensor, and of which notice shall be given to the Licensee hereafter.

5. To permit the Licensee to take advantage of any standing order leasing price mentioned in such schedule, such standing order with any Licensed Manufacturer or Importer shall be for one or more prints of each and every subject regularly produced, and offered for lease by such manufacturer or importer as a standing order subject and not advertised as special by such Licensed

*Note. Words in brackets eliminated by Patents Company by notice dated September 13, 1911, effective October 1, 1911.

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Manufacturer or Importer; and shall remain in force for not less than fourteen (14) consecutive days. Any standing order may be cancelled or reduced by the Licensee on fourteen (14) days' notice. Extra prints in addition to a standing order shall be furnished to the Licensee at the standing order leasing price.

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6. The Licensee shall not sell, rent, or otherwise dispose of, either directly or indirectly, any licensed motion pictures (however the same shall have been obtained), to any persons, firms or corporations or agents thereof, who may be engaged either directly or indirectly in selling or renting motion picture films.

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7. The Licensee shall not make or cause to be made, or permit others to make reproductions or so-called "dupe" of any licensed motion pictures, nor sell, rent, loan or otherwise dispose of or deal in any reproductions or "dupe" of any motion pictures.

8. The Licensee shall not deliberately remove the trademark or trade-name or title from any licensed motion picture, nor permit others to do so, but in case any title is made by the Licensee, the Manufacturer's name is to be placed thereon, provided that in making any title by the Licensee, the Manufacturer's trademark shall not be reproduced.

9. The Licensee shall return to each Licensed Manufacturer or Importer (without receiving any payment therefor, except that the said Licensed Manufacturer or Importer shall pay the trans-

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portation charges incident to the return of the same) on the first day of every month commencing seven months from the first day of the month on which this agreement is executed, an equivalent amount of positive motion picture film in running feet (not purchased or leased over twelve months before) and of the make of the said Licensed Manufacturer or Importer, equal to the amount of licensed motion pictures that was so leased during the seventh month preceding the day of each such return with the exception, however, that where any such motion pictures are destroyed or lost in transportation or otherwise, and satisfactory proof is furnished, within fourteen (14) days after such destruction or loss, to the Licensed Manufacturer or Importer from whom such motion picture was leased the Licensed Manufacturer or Importer shall deduct the amount so destroyed or lost from the amount to be returned.

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10. The Licensee shall not sell, rent, sub-let, loan or otherwise dispose of any licensed motion pictures (however the same may have been obtained) to any person, firm or corporation in the exhibition business, who may have violated any of the terms or conditions imposed by the Licensor through any of its licensees and of which violation the present Licensee may have had notice.

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11. The Licensee shall not sub-lease licensed motion pictures to any exhibitor unless a contract with said exhibitor (satisfactory in form to the Licensor) is first executed, under which the exhibitor agrees to conform to all the conditions and stipulations of the present agreement applicable

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to the exhibitor; and in the case of an exhibitor who may operate more than a single place of exhibition, a similar contract shall be executed in connection with each place so operated, and supplied with licensed motion pictures by the Licensee.

12. After February 1st, 1909, the Licensee shall not sub-lease any licensed motion pictures to any exhibitor unless each motion picture projecting machine on which the licensed motion pictures are to be used by such exhibitor is regularly licensed by the Motion Picture Patents Company, and the license fees therefor have been paid; and the Licensee shall, before supplying such exhibitor with licensed motion pictures, mail to the Motion Picture Patents Company, at its office in New York City, a notice, giving the name of the exhibitor, the name and location of the place of exhibition (and, if requested to do so by the Licensor, its seating capacity, hours of exhibition and price of admission, and the number and make of the licensed projecting machine or machines), together with the date of the commencement of the sub-licensing, all in a form approved by the Licensor. The Licensee, when properly notified by the Licensor, that the license fees of any exhibitor for any projecting machine have not been paid, and that the license for such projecting machine is terminated, shall immediately cease to supply such exhibitor with licensed motion pictures.

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13. The Licensee agrees to order during each month while this agreement is in force, for shipment directly to the place of business of the Li-

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consee in the City for which this agreement is signed, licensed motion pictures, the net leasing prices for which shall amount to at least \$2,500.

14. *The Licensee shall*, on each Monday during the continuance of this agreement, make or mail payment to each Licensed Manufacturer and Importer for all invoices for licensed motion pictures which have been received by the Licensee during the preceding week.

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15. *This agreement shall extend only to the place of business for the sub-letting of motion pictures maintained by the Licensee in the City for which this agreement is signed, and the Licensee agrees not to establish or maintain a place of business for the sub-letting of motion pictures, or from which motion pictures are delivered to exhibitors, in any other City, unless an agreement for such other City, similar to the present agreement, is first entered into by and between the Licensee and the Licensor.*

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16. *This Licensor agrees that before licensing any person, firm or corporation in the United States (not including its insular territorial possessions and Alaska) to lease licensed motion pictures from Licensed Manufacturers and Importers and to sub-lease such motion pictures, it will exact from each such licensee, an agreement similar in terms to the present agreement, in order that all licensees who may do business with the Licensed Manufacturers and Importers will be placed in a position of exact equality.*

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19. *It is understood and specifically covenanted by the Licensee, that the Licensor may terminate this agreement on fourteen (14) days written notice to the Licensee of its intention so to do, and that if the Licensee shall fail to faithfully keep and perform the foregoing terms and conditions of lease, or any of them, or shall fail to pay the leasing price for any motion pictures supplied by any Licensed Manufacturer or Importer when due and payable, according to the terms of this agreement, the Licensor shall have the right to place the Licensee's name on an appropriate suspended list, which the Licensor may publish and distribute to its other licensees and to exhibitors and to the Licensed Manufacturers and Importers and to direct the Licensed Manufacturers and Importers not to lease licensed motion pictures to the Licensee, and the exercise of either or both of these rights by the Licensor shall not be construed as a termination of this license, and the Licensor shall also have the right in such case, upon appropriate notice to the Licensee, to immediately terminate the present license, if the Licensee shall so elect, without prejudice to the Licensor's right to sue for and recover any damages which may have been suffered by such breach or non-compliance with the terms and conditions hereof by the Licensee, such breach or non-compliance constituting an infringement of said re-issued Letters Patent. It is further agreed by the Licensee that if this agreement is terminated by the Licensor for any breach of any condition hereof, the right to possession of all licensed motion pictures shall revert twenty days after notice of such termination, to the respective Licensed Manufacturers and Importers from whom they*

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were obtained and shall be returned to such Licensed Manufacturers or Importers at once after the expiration of that period.

20. It is understood that the terms and conditions of this license may be changed at the option of the Licensor upon fourteen (14) days' written notice to the Licensee, but no such change shall be effective and binding unless duly ratified by an officer of the Licensor

167 LEASING PRICES OF LICENSED POSITIVE MOTION PICTURES.

List..... 13 cents per running foot
Standing Order..... 11 " " " "
Films leased between
two and four months
after release date... 9 " " " "
Films leased between
four and six months
after release date... 7 " " " "
Films leased over six
months after release
date 5 " " " "

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A rebate of 10% will be allowed on all leases of licensed motion pictures, except at the 7 cent and 5 cent prices, which are net; said rebates to be due and payable between the 1st and 15th days of each of the months of March, May, July, September, November and January, on all films leased during the two months preceding each said period, provided all the terms and conditions of this license agreement have been faithfully observed.

(Complaint—Exhibit A.)

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TERMS.

All shipments are made F. O. B. lessor's office at lessee's risk.

All motion picture films are to be shipped to lessee's office only.

The lengths at which motion picture films are listed and leased are only approximate.

MOTION PICTURE PATENTS COMPANY
By D. MacDonald, General Manager.

LICENSEE'S SIGNATURE
GREATER NEW YORK FILM RENTAL CO.
Secy.

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Place of business for which this license is granted
Street and No. 24 Union Square

City New York State New York.

Date Jan. 20/09.

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SUPREME COURT,
NEW YORK COUNTY.

GREATER NEW YORK FILM RENTAL
COMPANY,
Plaintiff,

against

MOTION PICTURE PATENTS COM-
PANY and others,
Defendants.

STATE AND COUNTY OF NEW YORK—ss:

WILLIAM FOX, being duly sworn, says:

I am President of the plaintiff in this action, and have read the accompanying complaint, verified by me, and all the allegations therein contained, not stated to be made upon information and belief, are true of my own knowledge.

I first became interested in the motion picture business in 1906, as an exhibitor, and from time to time acquired control of various motion picture theatres, now numbering ten of the largest, best equipped and best patronized, in the Boroughs of Manhattan and Brooklyn, City of New York, in which motion pictures obtained from the defendants designated in the complaint as licensed manufacturers have been and still are displayed to the public.

The plaintiff was organized in March, 1907, for the purpose of purchasing projecting machines and films, and in turn leasing machines and films

(Affidavit of William Fox.)

to exhibitors. The business of the plaintiff is, and ever since its organization has been, that of a rental agency, the nature of which is explained in the complaint, and appears herein.

From the time of its organization, until January 20, 1909, when it perforce accepted the license agreement, Exhibit A, attached to the complaint, the plaintiff carried on its business by purchasing outright both projecting machines and films, and particularly the latter, from all the defendants herein designated in the complaint as licensed manufacturers, except the Melies Manufacturing Company. Until about January, 1908, those manufacturers were not "licensed manufacturers," but were carrying on business independently of one another, and there was native competition among them. They sold both apparatus and films outright, both to rental agencies and to exhibitors, and served all comers without discrimination. There were, also, other importers of foreign film doing business in the United States, and the plaintiff dealt with them prior to the early part of 1908, when it was obliged to cease such dealings, owing to the restrictions placed upon the rental agencies by the manufacturers when they combined under the license of the Edison Manufacturing Company, as next hereinafter stated.

In or about January, 1908, the defendants designated in the complaint as licensed manufacturers, except the Melies Manufacturing Company and George Kleine and the American Mutoscope & Biograph Company, accepted licenses from the Edison Manufacturing Company to manufacture under the patents owned and controlled by that company. Theretofore, a number of these manufacturers had been manufacturing, as I under-

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stand, under patents owned or controlled by the American Mutoscope & Biograph Company, or without any licenses whatever, and in defiance of the patents both of the Edison Company and of the Mutoscope Company.

There was much litigation between the Edison Company and the Mutoscope Company, involving also manufacturers under those respective patents, and also rental agencies and exhibitors using machines and films claimed by the one company or the other to be infringements.

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After the aforesaid manufacturers accepted Edison licenses, there was still active competition on the part of Kleine, who was an importer of foreign films, and the Mutoscope Company and its licensees operating under its patents. There was a number of manufacturers so operating under the Mutoscope patents.

The manufacturers under the Edison license refused to sell apparatus or films to any agencies or exhibitors that would not deal exclusively with them. The Mutoscope Company and the manufacturers operating under its patents made no such restrictions, and sold without discrimination.

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The apparatus and films produced under the Edison patents were generally regarded as superior to the others, and the result was that the manufacturers under those patents acquired a large part of the business, although the rival manufacturers were carrying on an extensive trade.

The prices of film produced by the manufacturers under the Edison license varied until about June 1, 1908, when the Edison Company reduced its price from 12 cents per running foot for immediate release film—meaning film to be used by all of the rental agencies throughout the United

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States on the same designated date—to 9 cents per running foot, less 10 per cent if paid for within one week after delivery. The Vitagraph Company reduced its price for the same kind of film from 10, 12 and 14 cents per running foot to 9 cents per running foot, less 10 per cent if paid for within one week after delivery. All the other manufacturers under the Edison license made a uniform price of 9 cents per running foot, less the 10 per cent rebate. Prior to June 1st, the various prices had been met, without any rebate, although the purchasers were required to pay for the film either C. O. D. or within one week, and unless they did so no more film were shipped to them.

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The object of making the price 9 cents per running foot, less the 10 per cent rebate was to enable these manufacturers operating under the Edison license to control the business and drive the other manufacturers and importers out of the market. The cost of importing foreign film, after payment of duty, was fully 8 cents per running foot, and the price made by these licensed manufacturers—9 cents, less 10 per cent rebate—brought their price down practically to the actual cost of importing, or certainly of importing and handling the foreign film. The result was, that the Edison licensees acquired 85 or 90 per cent of the whole business of the country.

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In the summer or early fall of 1908, the advisability of a combination between the Edison licensees and the American Mutoscope & Biograph Company and its followers must have become apparent, and this was furthered by the active and constant litigation between the Edison Company and the Mutoscope Company over their patents.

(Affidavit of William Fox.)

Between June 1st and September 1st, 1908, the Edison licensees had so largely acquired the business of the film rental agencies and exhibitors that they could and did, on September 1, 1908, increase the price for their aforesaid film to 11 cents per running foot, with the same 10 per cent discount.

It was stated by some of the manufacturers, at a meeting of the film rental agencies in the summer of 1908, that the Edison licensees would make a uniform price of 9 cents, with the 10 per cent rebate, for three months after June 1, 1908, for the purpose of driving the independents out of the field. As has been stated, that purpose was largely accomplished by September 1, 1908, in that the rental agencies and exhibitors, to the extent of 85 or 90 per cent of the whole number, bought their film from the Edison licensees and left the so-called independent manufacturers and importers. Having accomplished their purpose, the Edison licensees increased their price to 11 cents, less 10 per cent, as has been stated.

The situation was ripe for a combination between the Edison licensees and their rivals, the Mutoscope Company and its followers, and the result was the formation of the defendant Patents Company in or about December, 1908. Since that time, the uniform price of 11 cents per running foot, less 10 per cent rebate, has been maintained by the Patents Company for what are known as standing orders; that is, the rental agency is required to keep a standing order for a certain number of reels of film per week with some or all of the manufacturers, and this can be cancelled only on two weeks' notice. For film not included in the standing order, the agency must

(Affidavit of William Fox.)

pay the list price, which is, and has been since the Patents Company was formed, 12 cents per running foot, while before the Patents Company was formed it was 12 cents per running foot.

The difference with regard to films since the combination is not only what has already been mentioned, but that before the combination the rental agencies became the absolute owners of the film, and that since the combination they are mere lessees, but that, pursuant to the provisions of the license agreement, like Exhibit A attached to the complaint, the agencies are required to return the film to the manufacturers within a comparatively short period, long before the life or usefulness of the films has been exhausted. The agencies, while thus paying the full value of the films, have only a restricted use of them, and the supply is thus much curtailed.

Before the combination among the defendants under the Patents Company was formed, there were about 120 rental agencies throughout the United States buying apparatus and films from the defendants now designated as licensed manufacturers, and engaged in leasing such apparatus and films, particularly the latter, to exhibitors. About 20 of such rental agencies existed and carried on business in the Borough of Manhattan, City of New York. After the combination was effected, the defendant Patents Company refused to license many of the existing rental agencies, and reduced the number in the United States to about 75, which received licenses from the Patents Company, of which number 9 were licensed in the Borough of Manhattan.

These 75 rental agencies have all, except the plaintiff, been driven out of business by the de-

(Affidavit of William Fox.)

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defendants since the combination was effected. Of the 9 licensed in the Borough of Manhattan, 2 were eliminated by the arbitrary cancellation of their licenses without cause, and without the payment to the owners of anything whatever, and the General Film Company succeeded to their business. Of the remaining 7, the business and good-will of 6 were sold to the General Film Company on terms dictated by Mr. J. J. Kennedy and his associates, including the licensed manufacturers, controlling the Patents Company and the General Film Company. The owners of those agencies had practically no option about selling. They were confronted with the alternative of accepting the terms offered them or suffering the cancellation of their licenses theretofore granted by the Patents Company.

By similar means, all the licensed rental agencies existing in the United States outside of the Borough of Manhattan were eliminated, some by arbitrary cancellation of their licenses, and others by enforced sale to the General Film Company under threats of such cancellation.

I am well acquainted with most of the officers and directors of the Patents Company and the General Film Company, and have had close observation of their business methods for about three years, and I know whereof I speak.

Formation of the Combination.

The defendant Patents Company was organized in or about December, 1908, and in that month the leading spirits in the Patents Company, viz.: Messrs. Frank L. Dyer, J. J. Kennedy, H. N. Marvin, J. A. Berst, and George

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(Affidavit of William Fox.)

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Kleine, held a meeting in the Borough of Manhattan, City of New York, with representatives of all the defendants herein designated as licensed manufacturers, except the Melies Manufacturing Company. The proceedings of that meeting have since become notorious in the trade, and an outline of the plan there evolved, encephal, in euphemistic terms, and without disclosure of all the details, was afterwards stated to me and to other representatives of rental agencies at a meeting held in New York a little later, to which I shall presently refer.

At the first meeting in New York, the Patents Company and the licensed manufacturers entered into agreements, by which all the patents owned or controlled by the manufacturers, and which are specified in the complaint, were assigned to the Patents Company, and the licensed manufacturers accepted identical licenses enabling them to operate under said patents, the substance of which license agreement is set forth in the complaint.

It was also agreed at said meeting, by the Patents Company and the manufacturers, as is evident from the terms of the licenses to rental agencies, of which Exhibit A attached to the complaint is a specimen, that the prices for leasing films should be fixed and maintained, and they were fixed, and have ever since been maintained at the sums stated in said Exhibit A, to wit:

List	13 cents per running foot.
Standing order	11 " " "
Film loaned between two and four months after release date	9 " " "
Film loaned between four and six months after release date	7 " " "
Film loaned over six months after release date	5 " " "

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(Affidavit of William Fox.)

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Said prices, except the 5-cent and 7-cent rates, are subject to a rebate of 10 per cent payable between the 1st and 15th days of each of the months March, May, July, September, November and January, on all films leased during the two months preceding each said period, provided all the terms and conditions of the license agreement have been faithfully observed.

Shortly after this first meeting another meeting was called in New York, which was attended by representatives of all or nearly all the film rental agencies in the United States and by representatives of all or nearly all of the defendants designated as licensed manufacturers (except the Melies Manufacturing Company, which was not at that time in existence). In further reference in this affidavit to the licensed manufacturers it should be understood that the Melies Manufacturing Company is not included, but the George Melies Manufacturing Company, a corporation doing business in Chicago and engaged in manufacturing film, is included. This meeting was also attended by a number of the officers of the Patents Company, including Dwight Macdonald,

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General Manager of the Patents Company. The representatives of the rental agencies were informed that the manufacturers of film and machines had all taken licenses from the Patents Company and that films and machines would no longer be sold outright, but only leased, and only to such rental agencies as should be licensed by the Patents Company. Mr. Macdonald read the license agreement which all rental agencies would be required to sign. It was in all respects like Exhibit A attached to the complaint herein.

There was most vehement protest on the part of the representatives of the rental agencies, but

(Affidavit of William Fox.)

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it was useless and all attempts to secure modification of the provisions of the license agreement were in vain, and we all finally realized that our only choice was either to accept the terms of the license agreement or go out of business.

I objected vigorously to signing the agreement, but finally accepted it in behalf of the plaintiff, because there was no alternative if the plaintiff wished to continue business.

Ever since January 29, 1909 when said Exhibit A was signed the plaintiff has fully performed all the terms and conditions of that agreement on its part.

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Pursuant to one of the provisions of the agreement the plaintiff has returned to the licensed manufacturers film which it had purchased outright and paid for, and which had cost the plaintiff upwards of \$300,000, and which at the time of its return was fairly worth upwards of \$100,000. To be sure, its market value had been destroyed by the action of the Patents Company and the licensed manufacturers in prohibiting the use of that film, but it was worth fully \$100,000 for exhibition purposes if it could have been used or sold.

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In the early part of September, 1911 I was sent for by Mr. P. L. Waters, General Manager of the General Film Company, and called upon him at his office in the office of the General Film Company, 200 Fifth Avenue, New York City. I remember our conversation quite distinctly, and quote it as nearly as I can recollect, in the words used:

Mr. Waters said:

"Fox, I want to advise you, in a friendly way, that now is the right time to offer the

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most won probably

(Affidavit of William Fox.)

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Greater New York Film Rental Exchange
for sale to the General Film Company."

I said:

"What do you mean by that? Why is this the right time any more than any time? I have no idea of selling our business. We are doing well enough."

He said:

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"Now, Fox, I want to be your friend. You know that I am the General Manager of the General Film Company, and I know the inside workings, and my advice to you would be to offer your plant for sale now, for if you don't you might never have another opportunity."

I said:

"Now, Waters, what do you mean by that? If it is the idea of the General Film Company and the Motion Picture Patents Company and the manufacturers, to cancel my license, of course I want to sell my plant and sell it quick. If you don't contemplate jobbing me and cancelling my license, why then I have no idea of selling and don't want to sell unless I can sell on the basis of the earning capacity. My plant earning from \$60,000 to \$75,000 last year. I would expect anywhere from \$800,000 to \$750,000."

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"Why", he said: "Don't be foolish. I don't say that we are going to cancel your license, and I don't say that we are going to job you, but I will advise you that if you don't offer your plant for sale now, as I said before, I don't think you will get another chance."

(Affidavit of William Fox.)

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I said:

"Waters, why not be frank with me? If it is the idea of your Company and the Patents Company to have my license taken away, why then I have got to take almost any price that I can get from you."

He said:

"Well, what would your price be?"

I said:

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"Under the circumstances, you claiming to be my friend, try and get for me \$150,000."

He said:

"Now you are coming to your senses, except that you are asking too much money, but I think that this would be a good time to call in my friend J. J. Kennedy who, you no doubt know, is the President of the General Film Company, Treasurer of the Motion Picture Patents Company and Vice-President of the American Autoscope & Biograph Company. He, being the big man here in all of these companies, could talk to you officially and whatever he did would be upheld by the various companies he represents."

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He then brought Mr. Kennedy in. Mr. Kennedy said:

"Fox, I am glad too see you in our offices. What can I do for you?"

(Affidavit of William Fox.)

I said:

"Mr. Kennedy, the only thing you can do for me is to assure me that you don't intend to job me by cancelling my license."

He said:

"Why, that is foolish. That is furthest from our mind."

Waters said:

"I was speaking to Fox on the basis of buying his exchange for the General Film Company."

Kennedy said:

"Have you got a price in mind, Mr. Fox, as to what you would like to have for your plant?"

I repeated to Kennedy the exact conversation that I had with Waters in the first instance. Kennedy said:

"Of course you understand the selling of your plant is not compulsory, and if you expect any such figures as that, why go right along and don't bother about us; but if you want our figures I would be glad to let you know how much we think your plant is worth, and that is made up in table form, the exact price that we paid for every exchange that we bought throughout the country. These figures are made up according to the amount of film that you are buying and according to the amount of customers that you have on your books."

Handwritten note:
 Kennedy said I was
 cancelled, and that
 company was not
 could be used

(Affidavit of William Fox.)

I said:

"Mr. Kennedy, what are those figures? Supposing you show me what that would amount to."

Mr. Kennedy then took from his pocket a memorandum and from that memorandum made up his figures on a pad, and said:

"To buy your exchange on the same basis as we have bought all of the others—and we have bought them all over the country—you would be entitled to \$85,000 plus ninety per cent. of the price that you paid for the last week prior to our taking possession, which would bring the figures up between \$88,000 and \$89,000. You know the buying of these plants is not all velvet. We have gone to some territory and bought plants and paid \$25,000 to \$30,000 for them and found that they were running on a basis that they were losing \$18,000 a year, and only by the combined efforts of this great big corporation of ours in being able to shift new customers into that exchange and taking some of those that were a great distance away from that exchange and taking care of them with one of our exchanges nearer to that customer, were we able to put some of these plants on a paying basis."

I then said:

"If you paid anything like \$25,000 or \$30,000 for a plant that was losing \$18,000 a year, at your own figures any price that I asked for mine, considering that it is making between \$60,000 and \$75,000 a year, would not be too large, because in mine you have a manufactured business of a great earning capacity and without it being controlled by

(Affidavit of William Fox.)

214

your great big corporation and without your perfecting economies in it, that business, even at a purchase price of \$600,000 would give you a net return of ten per cent."

Kennedy said:

"Of course we are not buying on that basis at all. We are only buying the plants that are willing to sell for our price. We give you the best price that we can afford to pay. We give everybody the same price. We make you this offer. You can either take it or let it go."

215

I said:

"Mr. Kennedy, if that is the best that you can do of course I don't want to sell. I hope that I don't find in the course of the next week or month or two months, that you have found some petty charge or other, under which you will cancel my license in view of the fact of my not wanting to sell today."

Mr. Kennedy said:

216

"If your license is cancelled, Fox, don't blame me. I am now talking for the General Film Company, and the General Film Company is not cancelling any license as you know, your license comes from the Motion Picture Patents Company."

I said:

"Mr. Kennedy, having in mind the close relationship between both companies, it will be a very easy matter for you to arrange to have my license cancelled if you see fit."

(Affidavit of William Fox.)

217

To which he replied:

"Don't worry. I won't do anything of the kind."

I then bade Mr. Kennedy good-bye. Mr. Waters accompanied me downstairs to the cafe of the Fifth Avenue building, where he invited me to have a drink with him, and said:

"Fox, I am surprised at a smart fellow like you for whom I have had a high regard, to be so stupid and not to be able to see the conditions as they have arisen. Remember the course is a great big wheel and you are only a small chip of wood in the way of it. You don't suppose that I, as the driver of my Company, am going to swerve my wheel out of the road. I will be obliged to drive over you every time I come across you, and the result will be that this heavy wheel will soon crush the small chip of wood to splinters. Now, if I were you, I would take Kennedy's offer. My close friendship for you would lead me to say that I would be glad to intercede with Mr. Kennedy in your behalf and try to get you an even \$100,000 for your business."

218

219

To which I replied:

"I thank you very much. I will think it over, and I hope that between now and the time when I have thought it over, that I don't find that you have been the cause of having my license cancelled by the Patents Company."

That ended the interview. I had no further conversation with anybody representing the Patents Company or the manu-

(Affidavit of William Fox.)

220

facturers or the General Film Company until after the plaintiff received the notice of cancellation dated November 14, 1911, set forth in the complaint.

On November 17, 1911, I telephoned Mr. Kennedy and made an appointment to call upon him at his office on the next day (the 18th). I had an interview with him on that day at which he and I were the only ones present. The conversation was as follows:

221 I said:

"Mr. Kennedy, you no doubt are aware of the fact that the Greater New York Film Rental Company received the cancellation of its license on November 14th from the Motion Picture Patents Company, which was left at our office on Tuesday evening by a messenger. If I am informed correctly, the manufacturers had a meeting on Tuesday, November 14th, and I suppose that at that meeting it was decided that my license should be cancelled."

222 Mr. Kennedy said:

"You are absolutely right about that. We did have a meeting on Tuesday, November 14th, and at that meeting it was decided that your license should be cancelled."

I said:

"Of course, Mr. Kennedy, I am not surprised at this, because I have really been expecting this ever since I had my talk with you at 200 Fifth Avenue some time ago."

(Affidavit of William Fox.)

223

He said:

"Fox, I don't want you to feel that way about it at all. I don't want you to think that talk had anything to do with the cancellation of this license. In fact, to show you that I am willing to be friendly and that I don't want to fight and squab, I will be glad to open our negotiations of before and see whether I can find some way of settling this up in a nice, peaceful manner."

I said:

"Mr. Kennedy, I am glad to hear you talk that way. Having in mind that my license has been cancelled and after that goes into effect I have nothing to sell, I suppose I am obliged to take almost anything that you want to give me."

He said:

"No, I want you to put your price upon it. I made you our offer and you turned it down. I want you to put your price upon it, and if I can possibly get you that amount of money I will be glad to do it."

I said:

"Mr. Kennedy, if you feel that way about it. I asked \$150,000 the last time I was at your office, having in mind that my license might be cancelled. Now that it has been cancelled I will take \$125,000. That is about \$25,000 more than was offered to me at the time I was down to see you, and surely \$25,000 is not so much to a great big company like yours, and would amount to a great deal to our company, especially having in mind its great big earning capacity."

Did they not have a right to cancel

(Affidavit of William Fox.)

226

He said:

"If you are not ready to accept the price that I originally offered you, and I don't remember exactly what that was, and if you think you ought to get \$125,000, why then leave the matter with me and I will be glad to take it up with our Executive Committee and see just what I can do for you. You can expect to hear from me by next Tuesday."

The interview then terminated.

227

I made an effort to get in touch with Mr. Kennedy by telephone on Tuesday, November 21st, and on every day of that week, and was always told at his office that he was not in and they did not know when to expect him. I left my telephone number and asked him to be good enough to call me up, which he did not do. I finally did reach Mr. Kennedy about Monday, November 27th, and he told me that he had been unsuccessful in calling a meeting of the Executive Committee and would make every effort to do so in a day or so and would let me hear from him. Not hearing from him on Tuesday, November 28th, I asked Mr. Rosenbluh of our office to call on one of the Executive Committee, a Mr. J. A. Berst, who was also an officer of the Pathé Freres Company, and asked him to arrange a meeting between Mr. Berst and myself. On Tuesday afternoon, at 3 o'clock I called on Mr. Berst and told him of the fact that I had been to see Mr. Kennedy on November 18th and that I left with him the price of \$125,000, and Mr. Berst said:

"Of course there is where you have made a mistake. You know if you had taken the price that Kennedy originally offered you,

(Affidavit of William Fox.)

229

or if on your visit on November 18th you had said to Kennedy: 'I will take what you previously offered me,' there is no doubt in my mind that Mr. Kennedy would have closed the transaction up with you there and then, but as long as you were looking for more money than our schedule called for, why, of course he would not deal with you."

I said:

"Mr. Berst, I really came here to ask you to intercede for me, to have my license reinstated, rather than to have the General Film Company buy me out, because I know of nothing that I have done that could have offended the Motion Picture Patents Company, or any of their rules that I have violated so that they would be justified in cancelling my license."

230

Mr. Berst said:

"You don't have to violate any of the rules of the Motion Picture Patents Company to have your license taken away. Your exchange is in the way of the General Film Company."

I said:

231

"How is any exchange in the way of the General Film Company?"

He said:

"If it was not for your exchange we could charge almost any price at all for licensed motion pictures in Greater New York and the surrounding territory; but every time that the General Film Company makes an effort to raise the price of one of its customers it finds that the customer has left the General

(Affidavit of William Fox.)

232

Film Company and has gone with your concern to rent films."

I said:

"Mr. Berst, how can you make a statement of that kind? You are not the active man at the General Film Company's office."

He said:

233

"Well, I am one of the Executive Committee, and all of these matters are brought to my attention. You ought to be happy that we did not cancel your license long before now, and if it were not for the fact that we all had a high regard for you we should have taken it away a year ago. We allowed you to reap the profits for a whole year so that when we did take your license away or when we did offer to buy you out you would feel that you got all there was in it for yourself. I suppose you know that you are the last licensed film exchange in America today, and that in itself ought to be enough compliment to you, and really you ought not to put any obstructions in our way or make it harder than necessary to let our combination go on raising its prices to whatever it can get, for you can readily understand that when we control the entire country we are not going to stop and let you be our only competitor."

234

I said:

"Mr. Berst, then I suppose it is in vain for me to expect that you are going to be interested to have my license reinstated."

(Affidavit of William Fox.)

235

He said:

"That is foolish. Your license is gone; in fact, some of the manufacturers are criticizing us for not taking it sooner. The only thing that I now can do for you—you say that you have been trying to get Mr. Kennedy on the telephone this past week and have been unsuccessful—I will try to get Mr. Kennedy on the telephone some time to-night and will try to intercede in your behalf—that he pays you the sum of money according to our schedule that we have paid to all the other film exchanges that we bought."

236

I said:

"When shall I call back to see you?"

He said:

"Come in tomorrow at 3 o'clock."

I called on Mr. Berst on Wednesday, November 29th. He said:

"I am awfully sorry to report to you that I have been unable up to now to locate Mr. Kennedy. I cannot imagine why he does not come to the telephone when I leave my name. He must have a reason for not wanting to answer. Since you were in to see me last night I could not close my eyes when I lay in bed. I saw your vision standing before me all of the time, and I feel that a great injustice has been done to you in not giving you the same sum of money that has been given to the other film exchanges that we bought. Of course I am in hopes that I will be able to arrange it for you—to get you the money that I feel you ought to get. If you will go out-

237

(Affidavit of William Fox.)

238

side and sit down for a few minutes I will ring up the three places where I am apt to find Mr. Kennedy and see whether I can talk with him."

I then sat outside. Later Mr. Berst opened his door and called me back into his private office and informed me that he was unable to get Mr. Kennedy on the telephone, gave me his card with his home address on and said that I should telephone him later in the evening, and he would make every effort in the meantime to get in touch with Mr.

239 Kennedy. Later in the evening I did 'phone to Mr. Berst and he informed me that he had talked with Mr. Kennedy and that I should ring up Mr. Kennedy. I did get Mr. Kennedy on the telephone that evening and he asked me to call and see him on Friday afternoon, December 1st. I called on Mr. Kennedy on Friday afternoon, December 1st. He said:

"Well, Fox, what can I do for you now?"

I said:

240 "Mr. Kennedy, I have been anxiously waiting to hear from you on my proposition of \$125,000."

He said:

"Of course you know that it is out of the question now."

I said:

"I don't see why that is out of the question. I talked to Mr. Berst day before yesterday, and he seems to think that a grave injustice

(Affidavit of William Fox.)

241

has been done to me, and that he would recommend that a liberal price be paid to me for my plant."

He said:

"You don't believe a word that fellow is telling you, do you? He is trying to show you that he is your friend, and he is making me the Fatsy. We have bought everybody on the same basis which is made up on our schedule, and if you will wait a moment I will get my schedules out and see what your plant figures to."

242

He then took from his safe and pocket certain schedules, and he explained to me that his idea was that in case they fell into the hands of anyone else no one else could figure out the basis on which they made out the prices for their plants, without having them both, and for that reason he kept half in his pocket and half in the safe. After going through a lot of figures he told me that the price the schedule showed was \$75,000. I reminded him of the fact that he told me at his office that he was willing to pay \$80,000, and that Mr. Waters said he thought he could get me an even \$100,000.

243

He said:

"Waters was not authorized to make any such statement. I have a faint recollection that I said something like \$88,000 or \$80,000, but to show you that I will help the thing along, why I will recommend that we pay you \$90,000."

(Affidavit of William Fox.)

244

I said:

"Mr. Kennedy, you claim you are my friend and Mr. Berst says he is my friend, and your Executive Committee is made up of three people, and I suppose a majority vote rules. Now, if you are in favor of giving me \$100,000, I am sure Berst is. Your third member of the committee, who is Mr. Albert Smith of the Vitagraph Company of America—I feel that he would be inclined to pay me a liberal price."

245 He said:

"Well, I will ring up Berst and see what he has got to say to \$100,000."

He then asked his operator to get Mr. Berst on the wire, and held the following conversation with Mr. Berst:

"I have Fox in my office and he wants \$100,000 for his plant."

He then hung up his telephone and said:

246

"I am awfully sorry that I did not connect you on the wire so that you could hear what Berst said; but Berst reminded me that the schedule figures only \$75,000 and said that in his conversation with you the other day he said that he was only in favor of paying you the exact amount the schedule calls for. Of course there is no use ringing up Smith on this matter, because I know Smith is your friend and Smith would be willing to give you \$150,000 if it was left to him. In view of Berst's stand in the matter, the best I would recommend to the Committee would be \$90,

(Affidavit of William Fox.)

247

000, and would depend upon Smith's support to get you the \$90,000."

I said:

"I am awfully sorry, Mr. Kennedy. I would like to have you make it at least \$100,000."

He said:

"Fox, for a fellow that has got nothing to sell, you have got more nerve than any other man I ever ran into. Have you got in mind that tomorrow night the last film will be shipped to you and that you will be down and out of the business, and that in view of this fact we are still friendly enough with you to give you this money?"

248

I said:

"Mr. Kennedy, of course that is all very nice of you, and I appreciate it very much, but if you say that is the best you will do, I suppose there will be no need of my arguing further on the subject. Of course you have in mind that tomorrow night, as you said, there will be no more films shipped to me. I supply so many theatres who depend upon brand new film, what do you recommend so that I can get film next week?"

249

He said:

"Wait a minute. I forgot all about that. In the first place, young man, I can't treat with you at all until you get a license. I can't buy your exchange if you haven't got a license."

(Affidavit of William Fox.)

250

I said:

"How are you going to arrange that?"

He said:

"I will ring up Marvin, Vice-President of the Patents Company and see if I can't show him a way to recall the cancellation of your license."

He said:

251

"If I accomplish that why then the manufacturers will keep on shipping you film and your business can go on the same as ever until we take possession—the contract will provide that we take possession as of December 11th at 8 A. M."

He then had his operator get Mr. Marvin on the telephone and said:

"I am negotiating for the purchase for the General Film Company of the plant of the Greater New York Film Rental Company. I would like to have you recall the cancellation of their license that you sent the Greater New York Company on November 14th. Now, I don't want you to do in this case as you have done in the People's Film Company case. There, instead of recalling the cancellation you simply extended the license for another week and when our negotiations were another week and when our negotiations were not closed in that week you had to give another extension of a week. In this case I want you to send a notice recalling the cancellation of the Greater New York license, so that they have it in their possession tomorrow, so that I can send them their contracts for the purchase of their plant on

252

(Affidavit of William Fox.)

253

Monday. Now, Marvin, to send the letter recalling the license, you will need the votes of the various manufacturers. You have my vote for the General Film Company. You have your vote for the Patents Company. I was informed by the telephone operator that Mr. Pelzer was there, and you have his vote for the Edison Company. Now ring up a few of the other manufacturers until you get the majority vote that is needed, and tell them that I said it was all right to recall this cancellation, as we have practically closed for the purchase of that plant."

I have now stated, substantially, the most important part of the conversation which lasted about two hours. In the course of it Mr. Kennedy repeatedly said that my company was in the way of the General Film Company and that it was a great trust which could not allow itself to be obstructed by me; and a great deal more to similar effect, which I have not taken time to set forth in detail. I then left, and on the morning of December 2nd the plaintiff received the notice dated December 1st, recalling the cancellation of license, which is set forth in the complaint.

Mr. Kennedy afterwards sent me a bill of sale to be executed by the plaintiff to the General Film Company and a contract between that company and my company, providing for the transfer of the business, including good will and lease of the premises occupied by my company. He had said on December 1st that he would send me these papers to be examined by my counsel.

On December 7th Gustavus A. Rogers, the plaintiff's counsel, in my presence and hearing telephoned Mr. Kennedy to the effect that my company would not sell, and on the next day (De-

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(Affidavit of William Fox.)

256

ember 8th) we received the notice of cancellation to become effective on December 25th, which is set forth in the complaint.

On November 21, 1911, my company received from Pathe Freres a letter of which the following is a copy:

"PATHE FRERES MOTION PICTURES
41 West 25th Street
New York, Nov. 20th, 1911.

257

G. N. Y. FILM CO.,
New York City.

Gentlemen:

We have been advised by the Motion Picture Patents Company that your License Agreement with the said concern will terminate on Monday, Dec. 4th.

We have therefore been instructed to discontinue delivery of films to you on or after the above date.

We regret very much that we have to discontinue business relations with you in this line.

Wishing you the best success and thanking you for past favors, we beg to remain,
Yours very truly,

258

PATHE FRERES,
Per M. Ramirez Torres."

For the reasons set forth in the complaint it will be impossible for the plaintiff to carry on its business if its license should be cancelled or the supply of films cut off by the licensed manufacturers or the regularity and promptness of the service in any wise interfered with.

The principal customers of the plaintiff are ten of the largest, best equipped and best patronized theatres in the Boroughs of Manhattan

(Affidavit of William Fox.)

259

and Brooklyn, (City of New York, devoted to the exhibition of motion pictures. I am familiar with the management and conduct of these theatres and interested in them, and have had frequent opportunity of observing the character of the pictures displayed thereat. Since the formation of the Motion Picture Patents Company and the execution of the exchange license agreement, Exhibit A, every and all of the theatres aforesaid have been exhibiting the pictures of the licensed manufacturers exclusively. Some of the theatres have come into existence since that time, but immediately upon the opening of the theatre and to the date hereof no other pictures have been shown therein excepting those of the licensed manufacturers; and the effect of discontinuing the use of the licensed film in any of the houses and particularly in the new theatres would be not only to destroy the effect of months of advertising in the new theatres and several years of advertising in the older theatres, but the result would be ruinous to the theatres. I am the managing officer of every and all of the theatres and entirely familiar with the performances, and upon my own knowledge of the theatres and the conditions thereat, I state that if the licensed manufacturers refuse to or cannot be compelled to or will not be compelled to deliver the licensed film to the plaintiff so that the theatres aforesaid may lease the licensed film, that it will be absolutely necessary for all of these theatres to cease their business relations with the plaintiff and to get the licensed film from the defendant General Film Company; so that the situation will be that the plaintiff will lose the best and most profitable patrons that it has.

260

261

He is in a double capacity here as pure film theatres

(Affidavit of William Fox.)

262

To emphasize the importance and necessity for inductive relief preliminary to the trial of this action, I state that there are in Greater New York, in addition to about five hundred small theatres where motion pictures are shown, at least twenty-five and probably thirty large theatres, each having a seating capacity of fifteen hundred to twenty-five hundred, devoted to this purpose. None of them use any film excepting the licensed film, and the audiences for several years last past have been educated to expect to see licensed film.

263

In addition to the ten large theatres above mentioned, supplied by the plaintiff, it also supplies about ninety other smaller motion picture theatres in Greater New York, to say nothing of about thirty outside of Greater New York.

All this business would inevitably be lost to the plaintiff if its supply of licensed film should be either discontinued or impaired.

The nature of the business is such that constant, regular and prompt supply of the licensed film is absolutely essential. Every reel of film

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has a release date before which the plaintiff is not permitted to release it and before which it may not be shown by any exhibitor. The General Film Company and its customers receive the same subjects with the same release dates, and if the plaintiff's supply should at any time be delayed the exhibitors served by the General Film Company would have exhibited the new film and it would be old and unserviceable to the plaintiff except as later runs than the first run, and the plaintiff gets the largest price for first run of films. The slightest interruption of the plaintiff's service would drive

(Affidavit of William Fox.)

265

its customers to the General Film Company and it would be impossible to get them back.

The film produced by the independent manufacturers referred to in the complaint, is for the reasons there stated not enable at this time of substitution for the licensed film. It has not the same range of subjects and is not produced in as large quantities as the licensed film, and it is impossible for any agency or exhibitor using licensed film to use in connection therewith any unlicensed film. That would be a violation of the license agreement, and the use of such independent film would also make the plaintiff and its customers liable to suit by the Patents Company for infringement of patents. The Patents Company has brought a number of such suits against exhibitors. There have been instances where licensed manufacturers having discovered unlicensed film in a motion picture theatre, have promptly replevied the licensed film and thereupon the Patents Company has cancelled the license of the exhibitor.

266

The value of the plaintiff's business and good will, so long as its license continues in existence, is from \$600,000 to \$750,000, and the plaintiff from October 1, 1910 to October 1, 1911 earned in its business between \$60,000 and \$75,000. If its license should be cancelled, its business and good will would be destroyed and become worthless and it could not sell its plant for more than the value of the fixtures.

267

Referring to the accompanying affidavit of William H. Swanson, I was present at the meeting of representatives of the rental exchanges in January, 1909 when the license agreement, like Exhibit A, was brought to our attention, and we

(Affidavit of William Fox.)

269 were informed that we must accept it and do business according to its conditions. As stated in Mr. Swanson's affidavit, a committee of representatives of the rental agencies was appointed to confer with the representatives of the Patents Company and the licensed manufacturers, and that committee, of which Mr. Swanson was chairman, reported back to us that no change in the agreement could be obtained, but that the Patents Company and the licensed manufacturers informed our committee that the license was good for the unexpired term of the patent under which we were to be licensed, that is reissue letters patent 12192, and that no license could be cancelled except for violation of its conditions and after a full hearing.

270 On or about January 20, 1909, which is the date of the plaintiff's license, I had a conversation with Dwight Macdonald who was General Manager of the Patents Company, upon this subject. I telephoned him and said that I had the contract on my desk but had not signed it and wanted to be sure of where my company would stand and how long the contract was good for. He said, in substance, that I had overheard the discussion at the meeting and heard Swanson's report that the license was good for the unexpired term of the patent, and that I might be perfectly sure I would not lose the license so long as the patent was in force unless I violated the terms of the license.

WILLIAM FOX.

Sworn to before me this)
16th day of December, 1911.
RAPHAEL BRILL,
Notary Public No. 109,
New York County.

SUPREME COURT,
NEW YORK COUNTY.

GREATER NEW YORK FILM RENTAL COMPANY,
Plaintiff,

against

MOTION PICTURE PATENTS COMPANY and others,
Defendants.

STATE AND COUNTY OF NEW YORK, ss:

LOUIS ROSENBLUTH, being duly sworn, says:

I am, and have been since its organization, Manager of the plaintiff in this action.

I am familiar with the moving picture business in its various branches, and particularly with the business formerly conducted by rental agencies like the plaintiff.

273 Before December, 1908, there were 123 rental agencies carrying on business throughout the United States. After the organization of the Patents Company and the combination effected with the licensed manufacturers, the number was reduced to 72 rental agencies, which were licensed by the Patents Company under license agreements in all respects similar to the one issued to the plaintiff, Exhibit A attached to the complaint.

Nine of the 72 licensed agencies were located in the Borough of Manhattan, City of New York. The only one of the 72 licensed agencies now re-

(Affidavit of Louis Rosenbluh.)

274

maintaining in business is the plaintiff in this action. I know the fact from my acquaintance with the trade, and, besides that, the information was given me by P. L. Waters, manager of the General Film Company, in a conversation had with him at his office about the middle of November, 1911.

That conversation was a sequel to a conversation I had with Mr. Waters at his office about three months earlier, when I called upon him in response to a telephone invitation from him.

275

Mr. Waters talked with me in a general way about the sale of the business of the plaintiff to the General Film Company. He said he thought it would be advisable for the plaintiff to sell, and that he did not see how it would be possible for it to continue in business in competition with the General Film Company. He said that the Greater New York Film Rental Company was the only licensed rental agency in the United States, except the General Film Company and one concern in the West. He intimated his own experience as owner of the P. L. Waters Exchange in this City with the General Film Company. He sold that business about July, 1910, to the General Film Company, and said to me that if he could be assured of a license from the Patents Company and that it would not be cancelled, he would gladly repay all the money he had received for the sale of his business and pay \$100,000 additional for the privilege of carrying on a rental exchange in this City.

276

At the second conversation with Mr. Waters, which was upon the same general subject, he told me that the western concern was no longer a licensed exchange, thus leaving the General Film

(Affidavit of Louis Rosenbluh.)

277

Company in sole possession of the field in the United States, with the exception of the plaintiff in this action.

On or about November 29, 1911, I had a conversation with Mr. J. A. Berst, a director of the defendant Pathe Freres and treasurer of the defendant General Film Company. I went to Mr. Berst's office for the purpose of arranging a meeting between him and Mr. William Fox, President of the plaintiff, which I did arrange for that afternoon.

I asked Mr. Berst why the plaintiff's license had been cancelled, and he said that the Greater New York Film Rental Company was the only licensed rental agency remaining in business, except the General Film Company, and it was necessary to get our concern out of the way. He said that the managers of the various branch offices of the General Film Company reported to him, through officers of the Company, when asked why they could not get prices for film from exhibitors, that it was impossible so long as the Greater New York Film Rental Company was in the field, because, whenever the General Film Company expressed an intention to increase the rentals to exhibitors, the latter replied that they would get their film from the Greater New York Film Rental Company, which had not increased its prices, and that some of the customers of the General Film Company had already gone over to our concern.

278

279

The plaintiff never solicited the patronage of any customers of the General Film Company, but has lost customers to the General Film Company, which has been actively soliciting the trade, and has been cutting prices and renting films below the prices charged by the plaintiff.

(Affidavit of Louis Rosenbluh.)

280

As much as three or four weeks before November 14, 1911, the date of the first notice of cancellation of the plaintiff's license, rumors were widespread through the trade in New York that the plaintiff would soon lose its license and be compelled to retire from business. Frequent reports came to me from exhibitors, who were doing business with the plaintiff, that such statements had been made by a representative of the General Film Company, and many of our customers inquired whether the statement was true.

281

Ever since the organization of the plaintiff, it has had standing orders with every one of the licensed manufacturers (so designated in the complaint) for the entire output of films of each of such manufacturers, except that occasionally such an order would be cancelled when the product of a particular manufacturer for a time fell below the standard and proved unsatisfactory to exhibitors.

Since the combination made in the latter part of 1908 or the beginning of 1909, the plaintiff has continued to keep standing orders with each of said licensed manufacturers for the entire output of such manufacturers, and has paid the rental fixed by the plaintiff's license agreement, which is eleven cents per running foot, subject to a rebate of 10 per cent, as provided in said license.

282

During the period of competition among the manufacturers preceding the aforesaid combination, greater enterprise was displayed by the manufacturers in obtaining and depicting new scenes and subjects than they have shown since the combination; the plaintiff and other rental agencies existing during the period of competition bought the films outright, paying therefor

(Affidavit of Louis Rosenbluh.)

283

less than since the combination has been existing for the films in the way of rental; the plaintiff and other rental agencies, before the combination, were able to make more extensive and profitable use of the films, first, because being the owners thereof they could run them indefinitely in moving picture shows so long as exhibitors could be found who were willing to use the films, and inasmuch as new exhibitors and new show places were constantly springing into existence in places where moving pictures were a novelty, the films could be kept in service for as long a period as two years, and in fact until they were physically worn out and useless; and, secondly, the rental agencies were not confined to leasing films to exhibitors licensed by anybody, and thus were free and unhampered in carrying on their business.

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Since the combination, as appears from the license agreement, Exhibit A, the period during which a rental agency can use the films is limited, and they may be leased only to licensed exhibitors. In addition, there is, and always has been, since the combination, constant danger of cancellation of a license owing to dishonesty of a licensed exhibitor who may yield to the temptation to pass films on to some unlicensed exhibitor, and there has frequently been more than a suspicion in the trade that such occurrences have been instigated by the Patents Company to afford an excuse for cancelling licenses. Owing to such risk in putting films into the hands of licensed exhibitors, it has been necessary for the plaintiff to restrict its activities, and it has in fact reduced its business outside of the City of New York so that it could keep close watch of the exhibitors to whom it leased films. It has also been necessary for the plain-

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(Affidavit of Louis Rosenbluh.)

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tiff to go to the expense of employing inspectors to visit the shows given by licensed exhibitors dealing with the plaintiff, to make sure that there was no violation of the terms upon which the films were leased or of the conditions of the plaintiff's license.

Before January, 1909, the prices of film sold by the various manufacturers varied, some being sold as low as 7½ cents per running foot. After the combination, the prices charged by all the licensed manufacturers were the same, and higher than the average prices before prevailing.

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The plaintiff has been obliged to reduce, and has reduced, the territorial extent of its business for the reasons mentioned.

The plaintiff has a large investment in its plant and business, and has built up a valuable good-will, which is day by day increasing in value, and it has made and is making large profits from its business. If its license were cancelled, and its supply of films cut off, or the promptness and regularity of the supply in any wise impaired, the plaintiff's business would be ruined.

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Its business requires it to receive from each of the licensed manufacturers the entire output of such manufacture as fast as the films are ready for the market. The essence of the rental exchange business lies in the ability of the rental agency to furnish new films, *i. e.*, films containing new scenes and subjects—to exhibitors weekly, in sufficient quantity to give them a variety of choice, and for that reason the plaintiff has always maintained standing orders for the entire output of all said manufacturers, and has thus far been served promptly and regularly and without discontinuation.

(Affidavit of Louis Rosenbluh.)

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The films are designated as "runs," according to the dates on which they are leased to exhibitors. The plaintiff usually bought from the licensed manufacturers 36 reels of film per week, and has hitherto bought from them 33 reels per week. Each reel contains a new scene or subject, and a release date is designated for each reel on which date it may be leased to exhibitors. Film supplied on the release date is known as the "first run"; that supplied on the next day is known as the "second run," and so on. The plaintiff has customers who take "first run" together with subsequent "runs," and other customers that always take later than "first runs." Those that make a practice of showing "first run" film would not deal with the plaintiff unless they were promptly supplied with the "first run," and if such film should, by means of any delay, be supplied by the plaintiff after the release date, it would not be serviceable as "first run" film, because other exhibitors obtaining their supply through the General Film Company would already have shown the same subjects on an earlier date. In all large cities, and particularly in New York, the freshness of the supply of film is of prime importance, and it would be impossible for the plaintiff to supply its best customers if it were not regularly and promptly furnished with all the new scenes and subjects put out by the licensed manufacturers.

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LOUIS ROSENBLUH.

Sworn to before me this
15th day of December, 1911.

DAVID DAVIS,
Notary Public,

Kings County, No. 83.

Certificate filed in N. Y. County.

Registers No. Kings Co. 4346. N. Y. County
2181.

292 SUPREME COURT OF THE STATE OF NEW YORK.

NEW YORK COUNTY.

GREATER NEW YORK FILM RENTAL
COMPANY,

Plaintiff,

against

293 MOTION PICTURE PATENTS COM-
PANY and others,
Defendants.

STATE AND COUNTY OF NEW YORK—ss:

WILLIAM H. SWANSON, being duly sworn, says:

1. I reside in Chicago, Cook County, Illinois. In the year 1906 I formed the firm of William H. Swanson & Company at No. 79 Clark Street, Chicago, Illinois, I engaged in the business of purchasing motion picture film and projecting machines and leased the films and machines to exhibitors on a weekly rental basis. In 1907 I formed and organized a corporation under the laws of the State of Illinois, known as the William H. Swanson Dixie Film Company, and established a similar business at New Orleans, La. In the same year I organized and incorporated a corporation known as the William H. Swanson St. Louis Film Company, doing a similar business at St. Louis, Mo. The following year I personally established the William H. Swanson Kansas City Film Company, doing a similar business in

(Affidavit of William H. Swanson.)

Kansas City, Mo. The same year I personally established the William H. Swanson Omaha Film Company at Omaha, Nebraska, doing a similar business. I continued to conduct all of the foregoing establishments until the latter part of 1908. During all of this time I purchased motion picture films from all of the following concerns: American Mutoscope & Biograph Company, Edison Manufacturing Company, Essanay Company, Kalem Company, George Klein, Lubin Manufacturing Company, Pathe Freres, Selig Polyscope Company, and Vitagraph Company of America, and from several of them I purchased projecting machines. The film that I purchased was mine, and I paid for same, and, as I have heretofore described, in turn I leased the film to exhibitors. Up to the year 1908 I had established a large business, the net profits of which were at least \$100,000 a year. The market was open. I was permitted to buy film wherever I chose to buy it. The manufacturers were competing with each other and selling goods only on quality, without regard to stampering order. By that I mean that I was not obliged to give any specified order—any continuous number of regular releases which could not be discontinued by means of a two weeks notice given in advance of the next coming release day.

(a) I will hereafter show that after the formation of the combination of the manufacturers and the organization of the Motion Picture Patents Company the course of dealings changed entirely: instead of it being a purchase arrangement, I and the other agencies were only permitted to lease film and not to purchase and could not purchase

*I was always told
that this film rental Co. before
the organization were cutting
prices & were making
no money & that on
account of organization
they started to make
money -*

(Affidavit of William H. Swanson.)

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but were obliged to take what the manufacturers saw fit to give us, and that the quality of film was to be determined absolutely by the manufacturers.

II.—Prior to January, 1909 the licensed manufacturers, to wit: American Mutoscope and Biograph Company, Edison Manufacturing Company, Essanay Company, Kalem Company, George Kleine, Lubin Manufacturing Company, Pathe Freres, Selig Polyscope Company, and Vitagraph Company of America, had combined, and the Motion Picture Patents Company was formed in the latter part of 1908 or in the early part of 1909.

(a) Thereupon, at the request of the licensed manufacturers a meeting of the representatives of all of the film rental exchanges in the United States was called while in session at the Imperial Hotel, Borough of Manhattan, City of New York, on or about January 12, 1909. At this meeting there were representatives of about one hundred film rental exchanges. I attended this meeting as a representative of the following concerns in which I was interested either as the sole owner or as the majority stockholder; William H. Swanson & Company, of Chicago, Illinois; William H. Swanson Dixie Film Company; William H. Swanson St. Louis Film Company; William H. Swanson Kansas City Film Company; and William H. Swanson Omaha Film Company.

III.—At that meeting the representatives of the film exchanges were informed by the manufacturers that the latter had formed the Motion Picture Patents Company and that it had li-

(Affidavit of William H. Swanson.)

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censed the manufacture of films and that thereafter the licensed manufacturers would only deal with such of the film exchanges as should be licensed by the Motion Picture Patents Company;

(a) That no films would be sold but that films would only be leased to the licensed exchanges under the terms of an agreement which they had prepared for signatures of such exchanges as they had determined to license. They also stated that they had concluded not to license all of the existing agencies, but that some of the agencies would not be licensed. The fact is that a number of the exchanges were refused a license.

(b) It was also stated that the licensed rental agencies would only be supplied with leased films as long as they continued to hold the license of the Motion Picture Patents Company, and no longer, and that the licensed rental exchanges would only sublease the film to such exhibitors as would be licensed by the Motion Picture Patents Company and none others, and that for each projecting machine upon which the film was shown a license fee of two dollars per week must be paid to the Motion Picture Patents Company.

(c) It was also stated that no licensed film rental agency should purchase, lease or deal in any other film excepting the film leased from the licensed manufacturers, and that no licensed exhibitor would be permitted to show or exhibit any film excepting the leased films of the licensed manufacturers, and that the agencies must return within a specified time the film which they had purchased and take in exchange leased film for

(Affidavit of William H. Swanson.)

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which they were to pay the leased price. Before the close of the meeting there was read to the representatives of the film rental exchanges a printed form of exchange license agreement similar in form to the exchange license agreement between the Motion Picture Patents Company and the Greater New York Film Rental Company, annexed to the complaint in this action, marked Exhibit A.

IV.—After the announcement was made, and the reading of the agreement referred to in the preceding paragraph, the representatives of the manufacturers stated that that was the only form of agreement that would be accepted by the Motion Picture Patents Company, without modification, and that any film rental exchange that refused to sign the agreement would not be supplied with film. Printed copies of the agreement were circulated among the representatives at the meeting, and they were informed that the Committee of the manufacturers was waiting in an adjoining room to get the sense of the meeting. All of the representatives of the film rental exchanges protested against signing the agreement and to the request for a compliance on their part with the conditions contained in it.

(a) As the result of the unanimous protest of the representatives of the film rental exchanges a committee was appointed of which I was the chairman. This committee waited on the committee of the Motion Picture Patents Company and the licensed manufacturers consisting of Frank L. Dyer of the Edison Company, H. N. Marvin of the American Mutoscope & Biograph Company and

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Mr. George T. Scull, at No. 10 Fifth Avenue, Borough of Manhattan, New York City, which was at the time the headquarters of the Motion Picture Patents Company and which at that time was the headquarters of the Edison Manufacturing Company—the aforesaid three having been represented as being the Executive Committee of the Motion Picture Patents Company. I stated, as the chairman of our committee, that the meeting of the representatives of the film rental exchanges had taken an adjournment and had postponed action, because there was a unanimity against signing the agreement, and that on behalf of the representatives of the film rental exchanges our committee was directed to say to the Motion Picture Patents Company and licensed manufacturers, that the agreement was harsh and arbitrary and should not be exacted. Mr. Dyer said that if the rental exchanges did not want to sign the agreement they did not have to. Thereupon asked Mr. Dyer whether if we did not sign if the licensed manufacturers would supply us with film. He said they certainly would not, that he had already stated to us, and repeated, that no one could buy any film at all, and that the licensed manufacturers would not lease the film excepting to such exchanges as were licensed and had signed the agreement. I then stated that if we did not sign the agreement and get a license and they would not lease films to us, that the exchanges would have to go out of business. Mr. Dyer said that was up to us. I then asked him how long we were to be bound by this agreement—how long this agreement was to be for; that they did not mention any specific time in the agree-

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(Affidavit of William H. Swanson.)

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ment, and still they said in it that they could cancel it at any time with or without cause. Mr. Dyer said that the license agreement was for the life of the patent and that unless it was cancelled in the manner provided in the agreement it would continue through the life of the patent. I then asked him how the agreement was going to continue through the life of the patent when they did not say in the agreement that it might be cancelled only "for cause," and requested him to insert a provision in the agreement that it could be cancelled only for cause. He said that we could rest assured that no man's license would be taken from him unless it was for cause and that if he lived up to the terms of the agreement it would continue throughout the life of the patent, and that if there were any violations of the agreement asserted that the man would have a fair and full opportunity of making explanations before his license was taken away. I thereupon became insistent that there were other things in the agreement that required change, and Mr. Dyer became impatient and said that the agreement had been prepared in that form for signature by everybody and not a word in it would be changed and it must be taken in that way or not at all.

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✕ V.—The committee made a report to the meeting of the representatives of the film exchanges, and discussion was had as to a way or means of obtaining film other than through the licensed manufacturers, and it was the unanimous sense of the meeting, after a full discussion, that there was no way in existence or that could be devised, of getting American film, excepting through the

(Affidavit of William H. Swanson.)

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licensed manufacturers, and that the only foreign film that was commercially of use was that of the Pathe Freres Company which had also joined the licensed manufacturers.

(a) With respect to the fact of obtaining film I state that at the time of the formation of the combination there were absolutely no manufacturers in the United States or Canada manufacturing film, and that there was no source of supply in America except through the licensed manufacturers; that all the foreign film manufacturers whose product was obtainable and had commercial value for us, were controlled by Pathe Freres a manufacturer which had joined the ranks of the licensed manufacturers and was one of them, and a few concerns the output of which was controlled by George Kleine, referred to in the license agreement as a licensed manufacturer, and who had joined the ranks of the licensed manufacturers, and also the supply of George Melies who had joined the ranks of the licensed manufacturers.

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(b) The fact is that the demand since 1909 has been for the film of American manufacture to the practical exclusion of the foreign made film, and that the ratio is about seven American films to one foreign film.

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VI.—The representatives of the film exchanges, confronted with this situation and considering that they were forced to sign the agreement or abandon their business, with the exception of the representatives of two concerns, expressed a will-

(Affidavit of William H. Swanson.)

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ingness to accept the agreement, and I am informed, that with the exception of these two concerns, that all of the agencies that the Motion Picture Patents Company was willing to license, thereafter executed the agreement—the total number of which I am informed and believe, is approximately seventy-five—and as to those two concerns, to wit: Chicago Film Exchange, of Chicago, Ill., and the Globe Film Exchange, of Chicago, Ill., both of which had a number of branches throughout the United States, they were

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practically driven out of business and were compelled to abandon their branches and the business of the main offices dwindled to almost nothing.

VII.—It was stated by Mr. Dwight Macdonald, that he was acting as the general manager for the Motion Picture Patents Company, and that statement was likewise made by the representatives of the Motion Picture Patents Company and the licensed manufacturers, and the representatives of the various exchanges were directed that all future dealings beginning with the signing of the agreements and thereafter, should be had with Mr. Macdonald. The fact is that Mr. Macdonald was the general manager of the Motion Picture Patents Company, and I have seen a number of agreements that have been executed by Mr. Macdonald as the general manager of the Motion Picture Patents Company. After I had expressed a willingness to accept and execute exchange license agreements for the various places in which I or my companies were interested, as heretofore described in paragraph I, of this affidavit, there was delivered to me a form of

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(Affidavit of William H. Swanson.)

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license exchange agreement for each place excepting the one at New Orleans, La. I executed the agreements and sent them to the Motion Picture Patents Company by mail to No. 10 Fifth Avenue, Borough of Manhattan, New York City, but they were never returned to me and I never received executed agreements. Several communications I sent to the Motion Picture Patents Company received scant attention.

(a) I was supplied with leased film, however, for less than two months, and in February, 1909, I was notified that I would not get any more film, and all of the exhibitors to whom I rented received a notice from the Motion Picture Patents Company that I was not licensed to rent films and that they were prohibited from taking service from me and that they must take service from one of the licensed rental exchanges.

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(b) I have not been supplied with any films from February, 1909, to the date hereof, by any of the licensed manufacturers, and I was unable to get any film elsewhere.

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(c) After receiving the notice from the Motion Picture Patents Company, and having been notified by the exhibitors to whom I had rented film, that they were instructed by the Motion Picture Patents Company to discontinue renting from me I went to Mr. George Kleine, Mr. William Selig of the Selig Polyscope Company, Mr. George Spoor of the Essanay Company, Mr. John Harden, a representative of the Edison Manufacturing Company at Chicago, Mr. John Rock, the Chicago representative of the Vitagraph Company of

(Affidavit of William H. Swanson.)

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America (who is the son of Mr. William Roek, the President of that Company), Mr. William Wright, the Chicago representative of the Kalem Company, and Mr. Montague, the Chicago representative of the Pathe Freres Company, all of whom were the men that I had previously dealt with in the course of my business with the various companies which they represented, and I requested that the orders that I had for film be filled, stating that it was destructive to my business if they did not fill the orders. I was informed by each and all of them that they had instructions from the Motion Picture Patents Company not to ship me any film, that under the arrangement they were not permitted to ship any film to me and that they would not ship any.

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(d) I tried to do business with the films that I had on hand, but I was unable to do so on account of the wide publicity which was given by the Motion Picture Patents Company to the fact that I had no license to rent film, and further, it was a matter of common knowledge that where films were shown by exhibitors that did not come from licensed agencies, that the licensed manufacturers by writs of replevin and other court proceedings during the course of the exhibitor's performance seized the films that were being shown, carried them away and broke up the performance. Some of the exhibitors expressed themselves to me to the effect that if they handled any film they would be subject to these suits in replevin and court proceedings and also damages and they did not want to become involved and consequently went elsewhere to get their films. For a period of several months my business was at a

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(Affidavit of William H. Swanson.)

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practical stand-still—so much so that the receipts of the agencies immediately dropped from a net profit of \$3,000 a week to a net loss, finally resulting in my being compelled to discontinue all of the agencies. I had a cash capital of \$100,000 or more in addition to the stock of films I had on hand and the assets and good will of my business which were worth \$750,000.

(e) So that while at the time when the Motion Picture Patents Company was formed and the combination was made with the licensed manufacturers I had a plant the assets and good will of which were worth \$750,000 over the liabilities, before the close of the year 1909 my capital was gone and my places since wiped out of existence. For a period of about three years prior to 1909 the net profits annually of my business averaged about \$75,000 a year. After the refusal to ship there were no profits, and, in fact, in my attempt to carry on business I lost all I had and was wiped out as I have heretofore explained.

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VIII.—Before January, 1909, the prices at which I purchased film were less than the schedule fixed under the exchange license agreement. The highest price I ever paid for film was twelve cents a foot, to the Edison Company, and not more than ten cents a foot to any of the other manufacturers, and to most of the manufacturers less than ten cents a foot—some of them seven and one-half cents a foot, depending on the quantity purchased—and of the same quality, kind and run as in the schedule of the exchange license agreement was to be leased to the rental exchanges at thirteen, eleven and nine cents a foot,

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(Affidavit of William H. Swanson.)

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so that the prices at which the films were to be
 leased from the licensed manufacturers were
 greatly in excess of the prices at which I had previ-
 ously purchased the films. Directly after the for-
 mation of the Motion Picture Patents Company I
 was notified by the various projecting machine
 manufacturers that the minimum price for a pro-
 jecting machine would be raised from Ninety-five
 dollars and One hundred dollars, which were the
 then prevailing prices, to One hundred and fifty-
 five dollars, and in some instances to Two hundred
 and twenty-five dollars. This rise of price by the
 projecting machine manufacturers and the Motion
 Picture Patents Company, under which the man-
 ufacturers paid a royalty of Five dollars on each
 machine, and the concerns which were manufac-
 turing the machines were licensed by the Motion
 Picture Patents Company or driven out of busi-
 ness, as no exhibitor under a license exchange
 agreement was permitted to exhibit films on any
 but licensed machines, and every machine was re-
 quired to have attached a label to the effect that
 329 it was duly licensed by the Motion Picture Pat-
 ents Company.

WILLIAM H. SWANSON.

Sworn to before me this 15th }
 day of December, 1911.

LOUIS COHEN,
 Notary Public, No. 54,
 N. Y. County.

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SUPREME COURT,

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NEW YORK COUNTY.

GREATER NEW YORK FILM RENTAL
 COMPANY,

*Plaintiff,**against*

MOTION PICTURE PATENTS COM-
 PANY and others,
Defendants.

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STATE AND COUNTY OF NEW YORK—ss:

JAMES J. LODGE, being duly sworn, says:

I live in Chicago, Illinois, and am Vice-President and General Manager of George Melies Manufacturing Company, a corporation organized under the laws of the State of Illinois, and carrying on business in Chicago.

The defendant Melies Manufacturing Company is a New York corporation, formed about July, 1910, by Gaston Melies, who was and still is President of the George Melies Manufacturing Company. He offered his resignation as such President, but our Company refused to accept it.

Said Gaston Melies and his son, Paul Melies, who was an employee of our Company, left that Company in the summer of 1910, induced, as I have always believed, by the Motion Picture Patents Company and others, and organized the Melies Manufacturing Company.

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(Affidavit of James J. Lodge.)

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My company, the George Melies Manufacturing Company, was one of the original "licensed manufacturers" under license granted by the Motion Picture Patents Company in or about December, 1908.

Such a license was signed by the Patents Company and by myself in behalf of my company, and nothing remained but to attach the seal of the Patents Company. The license was left with Frank L. Dyer, President of the Patents Company, for the purpose of having the seal of his company attached and on his promise to have the seal attached and forwarded to me in Chicago. The license never was forwarded to me, and I saw such license, for the first time since its execution, about 12 months ago, in the course of taking testimony in a suit brought by my company against the Motion Picture Patents Company to compel the Motion Picture Patents Company to deliver the license and specifically perform its undertaking therein. That suit is pending in the United States Circuit Court for the District of New Jersey.

The licenses granted by the Patents Company to the so-called licensed manufacturers were identical in terms. One of the provisions of each of those license agreements was that the licensed manufacturer covenanted not to supply film to any film rental agency which was not licensed by the Motion Picture Patents Company. It was agreed among all the licensed manufacturers and the Patents Company, at the time when the license agreements were made, that the licensed manufacturers were under obligation to and would furnish the film manufactured by them, respectively, to all film rental agencies in the United States

(Affidavit of James J. Lodge.)

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that were licensed or should be licensed by the Motion Picture Patents Company. This was a frequent subject of discussion at meetings of the licensed manufacturers with officers of the Motion Picture Patents Company. One or more officers of the Patents Company, usually Mr. Frank L. Dyer, the President, or Mr. Marvin, the Vice-President, or Mr. Kennedy, the Treasurer, were almost always present at meetings of the manufacturers.

The agreement and obligation of the licensed manufacturers to furnish film to all licensed film rental agencies was just as distinct and well understood as their written obligation in their license agreements not to furnish their film to any rental agency that was not licensed by the Patents Company.

Immediately after, as I understood, my company had been licensed by the Patents Company, it received from the Patents Company a list of licensed rental agencies, with instructions to supply film to no other agencies, and from time to time thereafter received revised lists showing changes in the licensed rental agencies, some of the licensed agencies having been eliminated, and our instructions were not to supply any film to such agency whose license had been cancelled.

For a considerable time before the formation of the General Film Company, the project of organizing such a company for the purpose of controlling the business of supplying films to licensed exhibitors was discussed at meetings of the licensed manufacturers and the Patents Company, and it was agreed that such a corporation should be formed for that purpose, and that the licensed film rental agencies throughout the United States

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(Affidavit of James J. Lodge.)

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should be absorbed by the new corporation to be composed of or controlled by the licensed manufacturers.

The General Film Company was accordingly organized under the laws of the State of Maine in the spring of 1910, and my information is that it has absorbed or eliminated every film rental agency in the United States, except the Greater New York Film Rental Company.

At meetings of the licensed manufacturers and the Patents Company preceding the formation of the General Film Company, it was stated that every licensed manufacturer would have the privilege of becoming a subscriber for stock of the General Film Company, and my understanding is that every one of the licensed manufacturers, except perhaps the Melies Manufacturing Company, did acquire stock in the General Film Company, either in its own name or in the name of some officer. The understanding was that the licensed manufacturers were to share equally in the stock of the General Film Company. The officers and directors of the General Film Company, since its organization, have been made up of officers or directors or representatives of the licensed manufacturers, and the General Film Company, ever since its organization, has been and still is completely controlled by the licensed manufacturers, and is simply the licensed manufacturers in a single corporate form. I do not know whether the Patents Company actually owns or controls any stock in the General Film Company, but the relations between that Company and the General Film Company, and, indeed, among the Patents Company, the licensed manufacturers and the General Film Company,

(Affidavit of James J. Lodge.)

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is of the closest character, and they constitute a single control and are practically a single organization.

The talk had over and over again at meetings of the licensed manufacturers and the Motion Picture Patents Company was to the effect that the film rental agencies and the exhibitors were making a disproportionate profit out of their business and realizing more proportionately than the manufacturers, and that that was a condition which must be remedied by getting control of the supply of film into the hands of the manufacturers and the Patents Company by means of the organization of such corporation as the General Film Company, and that such corporation when organized would be in position to change the rates for supplying film and exact a rental in proportion to the profits made by the various exhibitors.

From the time when the combination between the Patents Company and the licensed manufacturers was first made in December, 1908, the intention has been unswervingly to obtain the exclusive control of and, so far as possible, monopolize every branch of the motion picture business, including the manufacture of the cameras with which the pictures are taken, the taking of moving pictures upon the negative films, the transference thereof to the positive films, the manufacture of the projecting machines, and the supplying of films to exhibitors.

The royalty of \$2 per licensed machine per week to be paid by licensed exhibitors, as provided in the license given by the Patents Company to the film rental agencies, was, by agreement between the licensed manufacturers and the Patents Com-

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(Affidavit of James J. Lodge.)

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pany, divided as follows: A percentage—I do not remember whether it was 14 per cent. or 24 per cent.—was divided among all the licensed manufacturers in proportion to the quantity of negative film produced by them respectively; the balance of the fund was to be, and, to the best of my knowledge, was, turned over to the Patents Company for the payment of legal expenses involved in bringing and defending numerous litigations over patents and arising out of the various steps and proceedings taken by the Patents Company to secure control of the situation.

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The officers of the Patents Company, and particularly Mr. Dyer and Mr. Kennedy, repeatedly assured the licensed manufacturers that it was only a question of time when the Patents Company would control the whole situation, which would accrue to the benefit of all the manufacturers.

The projecting machines upon which the above-mentioned royalty of \$2 each per week is exacted from exhibitors, are, to a large extent, machines that had been bought outright by exhibitors or rental agencies during the past ten years or more, and the exaction of the royalty upon machines, which in many instances had for many years been owned outright by agencies or exhibitors, was simply an arbitrary exaction, illustrating the attitude which the Patents Company and the licensed manufacturers had taken toward the business.

J. J. LODGE.

Sworn to before me this
15th day of December, 1911.
WM. A. YORSE,
Notary Public No. 4,
New York County.

SUPREME COURT,

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NEW YORK COUNTY.

GREATER NEW YORK FILM RENTAL COMPANY,	}
<i>Plaintiff,</i>	
<i>against</i>	
MOTION PICTURE PATENTS COMPANY and others,	}
<i>Defendants.</i>	

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STATE AND COUNTY OF NEW YORK, SS.:

ABRAHAM CARLOS, being duly sworn, says:

I live at 1517 Washington Avenue, in the Borough of the Bronx, City of New York, and am engaged in business as an exhibitor of motion pictures at 3786 Third Avenue, in the Borough of the Bronx, City of New York. My place is licensed by the Motion Picture Patents Company, and I hold a license signed by that Company authorizing me to carry on business as an exhibitor of licensed motion pictures, and am required to display the license in a conspicuous place in my theatre. I have two projecting machines, which are also licensed by the Patents Company.

I have dealt with the Greater New York Film Rental Company, the plaintiff in this action, since April, 1910, obtaining licensed film from that company, and am still dealing with it.

Before April, 1910, I obtained licensed film from the Imperial Film Exchange, a rental agen-

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(Affidavit of Abraham Carlos.)

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cy engaged in business in the Borough of Manhattan, City of New York. I have done business with that agency since December, 1908, and continued to do business with it until April, 1910, at which time I was notified by the Motion Picture Patents Company that the license of the Imperial Film Exchange had been cancelled, and that I must not lease any more film from that concern.

Whenever the license of a rental agency is cancelled, immediate notice of the fact of cancellation is given to all licensed exhibitors, warning them not to take any more film from that agency.

I have known one Al Harstin during the past three or four years. He conducted a rental exchange before the organization of the Motion Picture Patents Company, and was one of those who did not obtain a license from the Company. He handled independent or unlicensed film for some time after the organization of the Patents Company, and then went out of business and closed his agency.

During the past three or four months, I have known Harstin as an agent or solicitor for the General Film Company, and he is well known throughout the trade in that capacity, and deals with many licensed exhibitors in behalf of the General Film Company.

On or about November 20, 1911, said Harstin called upon me at my place of business, and told me that the license of the Greater New York Film Rental Company had been cancelled, and that within a week or so it would get no more films, and he urged me to make a contract with the General Film Company for film, and said that if I would make the contract immediately I could get

(Affidavit of Abraham Carlos.)

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a better contract than if I waited until after the Greater New York Company had lost its license, because there would be so many of the customers of the Greater New York Company applying to the General Film Company for film that those who came early would get the best "runs."

I was taking the fourth and fifth "runs" from the Greater New York Company, and Harstin told me that the General Film Company could take just one more customer at that time for those "runs," and that if I would make a contract immediately I would get those "runs," and that he could not promise them to me if I waited another week.

I told him I would take the chances, and refused to make a contract with the General Film Company.

Beginning in the early part of November, 1911, there had been frequent rumors that the Greater New York Film Rental Company would soon lose its license, and I knew several exhibitors who had been dealing with the Greater New York Company who became frightened and left it, and made contracts with the General Film Company.

Although, as is well known in the trade, the prices charged by the General Film Company for its films have generally been higher than those charged by the Greater New York Company, yet, during the last two months, the General Film Company has offered lower prices to customers of the Greater New York Company for the purpose of inducing them to change. It has offered better "runs" for the same prices as exhibitors were paying for less desirable "runs," and has also offered to supply "specials"—that is, additional reels over and above those regularly supplied—without additional cost, although it charges its

358 (Affidavit of Abraham Carlos.)

regular customers extra for the "specials," as does the Greater New York Company.

It has been generally believed in the trade that these inducements were offered merely to entice away the customers of the Greater New York Company, and that after the General Film Company had got control of them the prices would be raised.

A. CARLOS.

Sworn to before me this 15th }
day of December, 1911. }

359 RAPHAEL BRILL,
Notary Public,
N. Y. County, No. 109.

360

SUPREME COURT,

361

NEW YORK COUNTY.

GREATER NEW YORK FILM RENTAL
COMPANY,
Plaintiff,

against

MOTION PICTURE PATENTS COM-
PANY and others,
Defendants.

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State and County of New York, ss.:

SAMUEL P. WEISSMANN, being duly sworn, says:

I live at 1327 Forty-third Street, in the Borough of Brooklyn, City of New York, and am engaged in business as an exhibitor of motion pictures at 2138 Eighth Avenue, in the Borough of Manhattan, City of New York.

I have dealt with the Greater New York Film Rental Company, the plaintiff in this action, for about three years, leasing licensed film from it for exhibition in my place. I am licensed by the Motion Picture Patents Company as an exhibitor.

363 Early in November, 1911, my recollection being that it was between the 6th and 11th of November, one Al Harstin, whom I have known for three or four months, and who is and was, at the time of his talk with me, and for several months before that, an agent of the General Film Company, came to me at my place of business, and told me that the Greater New York Film Rental Company would

(Affidavit of Samuel P. Weissmann.)

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soon lose its license, that the license was about to be cancelled by the Motion Picture Patents Company, and he urged me to make arrangements through him with the General Film Company for a supply of licensed film for exhibition in my place of business.

Before this conversation, Harstin had called upon me several times, and tried to induce me to leave the Greater New York Film Rental Company and get my film from the General Film Company. He represented the Waters Agency, which was controlled by the General Film Company, and he assured me that I would get better service, and he offered me a better "run" than I was getting, for the same money I was paying to the Greater New York Company. Such contracts are only made from week to week, and there would be nothing to prevent the General Film Company from raising the price after the first week. I refused to change, however.

At the conversation in November, Harstin said I would better make arrangements immediately with the General Film Company, because if I delayed another week I would not be able to get as good a deal and could not be sure of as good "runs" as I could have if I made arrangements then. He said that the Greater New York Film Rental Company would get no more films after Saturday, November 18th.

I declined to make any arrangement with the General Film Company.

It is generally known throughout the trade that the only remaining licensed rental agency in the City of New York, excepting the General Film Company, is the plaintiff, the Greater New York Film Rental Company.

(Affidavit of Samuel P. Weissmann.)

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Within the past two and a half years there have been a number of such licensed exchanges in the City of New York, but they have all been absorbed by the General Film Company, which is operating the various exchanges under the former names.

Before the organization of the Motion Picture Patents Company, there were more rental agencies in the City of New York than after the organization of that company, because it was generally understood that the Company refused to license a number of the former agencies.

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SAMUEL P. WEISSMANN.

Sworn to before me this
15th day of December, 1911.

RAPHAEL BRILL,
Notary Public,
N. Y. County, No. 100.

369

SUPREME COURT,

NEW YORK COUNTY.

GREATER NEW YORK FILM REN-
TAL COMPANY,*Plaintiff,**against*MOTION PICTURE PATENTS COM-
PANY and others,
*Defendants.**State and County of New York, ss.:*

GUSTAVUS A. ROGERS, being duly sworn, says:

I am one of the attorneys for the plaintiff in this action, which is about to be begun by the issuance of the accompanying summons.

The attorneys for the plaintiff are Messrs. Rogers & Rogers, whose office and Post Office address is 160 Broadway, in the Borough of Man-
hattan, City of New York.

An order to show cause, returnable in less than five days is asked for because it is of urgent importance that the motion to continue the injunction be heard without delay.

The next term of this Court at which this cause can be tried is appointed to be held in New York County on the first Monday of February, 1912.

(Affidavit of Gustavus A. Rogers.)

No previous application has been made to any Court or Judge for a temporary injunction herein, or for an order to show cause.

GUSTAVUS A. ROGERS.

Sworn to before me this
16th day of December, 1911.RAPHAEL BRILL,
Notary Public, No. 109,
New York County.

January 21, 1916.

Messrs. Holden and Lanahan:

I wish you would draft up to-day, so that it can be gotten to Mr. Edison not later than tomorrow, a memorandum showing the exact conditions under which the settlement was made with Fox, and also what each manufacturer, the G. F. Co., and the M. P. P. Co. got in the way of releases as a matter of future protection. Please send me copy of said memorandum.

I am going out of town, to be gone until Monday, and am anxious that Mr. Edison should know at once what this settlement was.

CHW/IWW

C. ~~H~~N W.

Handwritten: 12-2-16

Handwritten: Bet 2-4

January 31, 1916.

Mr. Wilson:-

RE SETTLEMENT GREATER NEW YORK FILM RENTAL CO.
vs. GENERAL FILM COMPANY et al.

The settlement in the above matter was effected January 1916 on the following basis:

The sum of \$300,000 was paid to William Fox as President of and on behalf of the Great New York Film Rental Company, the said sum being contributed equally by each of the following named parties, that is, \$30,000 each: General Film Co., Vitagraph Company of America, Motion Picture Patents Company, Thomas A. Edison, Inc., Kalem Company, Lubin Manufacturing Company, Eceanay Film Manufacturing Company, Selig Polyscope Company, Pathe Freres, and Biograph Company. The Lubin and Selig Companies gave notes instead of cash.

The Edison Company received a check from the Greater New York Film Rental Company amounting to \$4.20 in settlement of the Edison, Inc. account against the Greater New York Film Rental Company.

A release dated January 19, 1916 was duly executed in approximately thirty copies by the Greater New York Film Rental Company, William Fox, Eva Fox and Michael Fox. Mr. Holden insisted that an executed copy of this release be delivered to him before turning over the check of Thomas A. Edison, Inc., and such a copy was so delivered. This copy is in Mr. Berggren's files. The other copies were placed in the hands of Mr. George F. Soull to be delivered to the several defendants upon the execution of

certain releases running to the Greater New York Film Rental Company and William Fox and to be executed by certain of the defendants. We have delivered to Mr. Scull the following releases:

General Release dated January 19, 1916 of Greater New York Film Rental Company and William Fox by Thomas A. Edison, Inc.

General Release dated January 19, 1916 of Greater New York Film Rental Company and William Fox by Edison Manufacturing Company.

Copies of these releases are on file with Mr. Berggren. The release received by us and now on file with Mr. Berggren runs to various corporations and individuals named therein and including the following: Thomas A. Edison, Inc., Edison Manufacturing Company, Frank L. Dyer and William Pelzer. It is expected that each of the releases will ultimately receive an executed copy of this release. This release also extends to all officers or employees now or heretofore connected with the said several corporations with respect to certain acts. The Greater New York Film Rental Company also relinquished any claim or right it may have had under any contract to be supplied with film by any of the licensed manufacturers named in the release. For the exact terms of this document, reference should be made to the original.

While the release of the defendants was signed by officers of the Greater New York Film Rental Company and by all of its stockholders, there were also resolutions adopted at a stockholders meeting and at a directors meeting, authorizing the execution of the release, and certified copies of these resolutions are on file with the General Film Company.

Provision was made for the discontinuance of suit, and I understand that a stipulation was entered into by the attorneys for the respective parties providing for the entry of an order for this purpose. Mr. Soull is familiar with this feature of the matter.

There was also an agreement entered into between the Greater New York Film Rental Company and the General Film Company, whereby the General Film Company, for the payment of \$50,000 in twenty-five promissory notes of \$2000 each, payable on Jan. 26, 1916 and each of the twenty-four weeks thereafter, purchased from the Greater New York Film Rental Company the latter's entire stock of motion picture film, etc., and took over certain leases and also assumed certain liabilities of the Greater New York Company. For the exact terms of this agreement, reference should be had to the copy thereof.

During negotiations leading to the above settlement, a preliminary agreement was made between the manufacturers to subscribe a fund amounting to \$300,000, to be contributed to equally by the following companies, namely: General Film Co.,

Vitagraph Company of America, Motion Picture Patents Company, Thomas A. Edison, Inc., Kalem Company, Lubin Manufacturing Co., Essanay Film Manufacturing Company, Selig Polyscope Company, Pathe Freres, and Biograph Company, which said fund was to be placed in the hands of Messrs. Albert E. Smith, Frank J. Marion and Jeremiah J. Kennedy as Trustees, and to be used to pay any final judgment which may be obtained in the suit or to effect a settlement. Inasmuch as a settlement was actually made the next day, namely, January 19, 1916, this agreement became of no importance. A copy of the same O.K.'d by Mr. Edison is on file with Mr. Berggren.

HL-JS

File in box 24
I

Box 24

January 31, 1916

Mr. Berggren:-

RE SETTLEMENT GREATER NEW YORK FILM RENTAL CO. vs.
GENERAL FILM COMPANY et al.

During the negotiations leading to the above settlement, a preliminary agreement was made between the manufacturers to subscribe a fund amounting to \$300,000, to be contributed to equally by the following companies, namely: General Film Company, Vitagraph Company of America, Motion Picture Patents Co., Thomas A. Edison, Inc., Kalem Company, Lubin Manufacturing Co., Essanay Film Manufacturing Company, Selig Polyscope Company, Pathe Freres, and Biograph Company, and to be placed in the hands of Messrs. Albert E. Smith, Frank J. Marion, and Jeremiah J. Kennedy as Trustees, and to be used to pay any final judgment that might be obtained in the suit or to effect a settlement. Inasmuch as the settlement was actually made the next day, namely, January 19th, this agreement became of no importance. However, I hand you a copy of the same which should be filed with the other papers relating to this matter. This copy is of importance because it has been O.K.'d by Mr. Edison, and Mr. Wilson and Mr. Holden consider it as evidencing their authority to make the settlement finally entered into.

Kindly acknowledge receipt of this paper.

HL-JS

**Legal Department Records
Motion Pictures - Case Files**

***Motion Picture Patents Company v.
Independent Moving Picture Company of America***

This folder contains material pertaining to the suit brought by the Motion Picture Patents Co. against the Independent Moving Picture Co. in the U.S. Circuit Court for the Southern District of New York. The case was initiated in February 1910 and involved the alleged infringement of Woodville Latham's U.S. Patent 707,934. The selected items are from the complainant's record and consist of the index, bill of complaint, and testimony of William K. L. Dickson.

[PHOTOCOPY]

Legal Box 173

United States Circuit Court

SOUTHERN DISTRICT OF NEW YORK.

MOTION PICTURE PATENTS
COMPANY,

Complainant,

vs.

INDEPENDENT MOVING
PICTURE COMPANY OF
AMERICA,

Defendant.

In Equity,
No. 5-167.

COMPLAINANT'S RECORD ON FINAL HEARING.

KERR, PAGE, COOPER & HAYWARD,
Solicitors for Complainant.

THOMAS B. KERR,
PARCEL W. PAGE,
Of Counsel for Complainant.

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Circuit Court of the United States

SOUTHERN DISTRICT OF NEW YORK.

MOTION PICTURE PATENTS COM-
PANY,

Complainant,

vs.

INDEPENDENT MOVING PICTURE
COMPANY OF AMERICA,

Defendant.

In Equity,
No.

Patent No.

707,934,

Latham.

TO THE HONORABLE THE JUDGES OF THE UNITED
STATES CIRCUIT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK:

The Motion Picture Patents Company, a corporation organized and existing under the laws of the State of New Jersey, and having a regular and established place of business at New York City, in the County and State of New York, brings this its bill of complaint against Independent Moving Picture Company of America, a corporation organized and existing under the laws of the State of Illinois, and having a regular and established place of business at No. 111 East 14th Street, in the Borough of Manhattan, City of New York,

[PHOTOCOPY]

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- 4 County and State of New York, within the Southern Judicial District of New York, within which district, as well as elsewhere throughout the United States the acts of infringement hereinafter complained of have been committed.

And thereupon your orator complains and says that it is informed and believes, and therefore avers, as follows:

1. That prior to the 1st day of June, 1896, one Woodville Latham, a citizen of the United States, residing in the City, County and State of New York, was the first original and sole inventor or discoverer of certain new and useful improvements in projecting kinoscopes, which were not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to the application below mentioned, and not in public use or on sale in the United States for more than two years prior to his said application, and not abandoned by him; and that the said Woodville Latham 5 duly made application for letters patent of the United States for the said invention or discovery on or about the 1st day of June, 1896, in accordance with the then existing laws of Congress.

II. That thereafter by certain mesne assignments in writing, duly executed and delivered, and duly recorded in the United States Patent Office, the E. & H. T. Anthony & Company, a corporation of the State of New York acquired the entire right, title and interest to the said invention or discovery in projecting kinoscopes and in and to the said application for letters patent, and to any

3.

letters patent which might be granted for the said invention or discovery, which said assignment or a duly certified copy thereof is ready to be produced in Court, at your Honors so require.

III. That after the requirements of the then existing laws of Congress had been duly complied with in all respects by said applicant and his successors in interest, letters patent of the United States numbered 707,934, signed, sealed and executed in due form of law, for the said invention or discovery, were granted in the name of the said Woodville Latham as assignor to the said E. & H. T. Anthony & Company on the 26th day of August, 1902, whereby there was secured to the said E. & H. T. Anthony & Company, their successors, legal representatives and assigns, for a term of seventeen years from the said date, the full and exclusive right of making, using and selling, and of causing to be made, used and sold throughout the United States, the said improvements in projecting kinoscopes, as by said letters patent, or a duly certified copy thereof, to be produced in Court will more fully and at large appear.

IV. That, by certain mesne assignments in writing, duly executed and delivered and duly recorded in the United States Patent Office, all the right, title and interest in and to the said invention or discovery in projecting kinoscopes, and in and to the said letters patent thereof, including the right to sue for and collect all damages and profits therefore accrued by reason of past infringements of the said letters patent by the manufacture, use or sale of apparatus embodying the said invention or discovery, passed to and were acquired by your orator; and your orator is now the full and exclusive

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[PHOTOCOPY]

10 owner of said letters patent and all rights there-
under, as by said assignments or duly certified
copies thereof to be produced in Court will more
fully and at large appear.

V. That the utility and validity of said inven-
tions and said letters patent have been widely recog-
nized and acquiesced in by the public, and that
your orator and its predecessors have expended
great efforts and large sums of money introduc-
ing said patented invention into practice; and that
your orator and its predecessors have enjoyed, and
11 but for the infringements hereinafter set forth and
others similar thereto would still be enjoying all
the benefits and advantages of the said invention.

VI. That your orator and its predecessors have
given due notice to the public of the grant of said
letters patent No. 707,934 and of its rights there-
under, in the manner prescribed by law.

VII. That the defendant has well known all the
facts hereinbefore set forth, but contriving and
conspiring with others to injure your orator and
to deprive it of the profits, benefits and advantages
which might and otherwise would have accrued to
12 your orator from the said patent, has, since the
date of its issue, and also since the acquirement of
the said letters patent by your orator, without the
license of your orator and against your orator's
will and in violation of its rights, made, used and
sold and caused to be made, used and sold, and
now continues to make, use and sell, within the
Southern District of New York and elsewhere in
the United States moving picture apparatus, each
of which embodies the invention or discovery de-
scribed and claimed in your orator's said patent
707,934, the exclusive right to make, use and sell

5
which is by law vested in your orator as aforesaid; 13
and the said defendant in disregard of your
orator's rights refuses to pay to your orator the
profits which it has made by such unlawful manu-
facture, use and sale or to desist from further in-
fringement of the said patent; all of which acts
are in violation of your orator's rights and are
contrary to equity and good conscience and tend
to the manifest injury of your orator in the prem-
ises.

VIII. That by reason of the said unlawful acts of
the defendant, your-orator has suffered and still
suffers great and irreparable loss and injury, and
has been deprived and is being deprived, of great
gains and profits which it otherwise would have
received and enjoyed, but which have been received
and enjoyed by the said defendant; that the said
defendant intends and threatens to continue such
infringement and is prepared and ready so to do;
and that your orator is unable to state how many
machines employing the invention described and
claimed in the said patent have been unlawfully
made, used or sold as aforesaid by the said defend-
ant, and is unable to state the extent of the profits
received and enjoyed as aforesaid by the defendant
14 from such unlawful making, using and selling, but
that your orator believes the same to have been
very large and prays a discovery thereof. 15

IX. Your orator therefore prays:

1. That the said defendant, Independent Moving
Picture Company of America, may be required to
make, according to the best of its knowledge, in-
formation and belief, full, true, direct and perfect
answer (not however under oath, which is hereby
expressly waived) to all matters hereinbefore

[PHOTOCOPY]

6
16 stated and charged the same as if specifically interrogated as to each.

2. That a writ or writs of *subpoena ad respondendum* may issue from and under the seal of this Court, directed to the said defendant, Independent Moving Picture Company of America, commanding it to appear and answer unto this bill on a day certain therein to be named, and to abide by and perform such order or decree in the premises as to this Court shall seem meet and as may be required by the principles of equity and good conscience.

17 3. That the defendant, Independent Moving Picture Company of America, may be decreed to account for and pay to your orator the profits unlawfully derived as aforesaid from the violation of your orator's rights; and that upon entering the decree against the defendant your Honors may assess or caused to be assessed under your direction the said defendant's unlawful profits, and in addition thereto the damages sustained by your orator by reason of the said infringement; and that your Honors may increase the actual damages so assessed to a sum equal to three times the amount thereof under the circumstances of the unlawful and unjust infringement.

18 4. That a writ of injunction may be issued out of and under the seal of this Honorable Court, perpetually restraining and enjoining the said defendant, Independent Moving Picture Company of America, its agents, attorneys, officers, clerks, employees, servants and workmen, from any further manufacture, use or sale in any manner of the said patented improvements, or any part thereof in violation of your orator's said rights; and that the

19 infringing devices in possession of or use by the defendant may be decreed to be destroyed or delivered to your orator for that purpose.

20 5. That a provisional or preliminary injunction may be issued out of and under the seal of this Honorable Court restraining and enjoining the said defendant, Independent Moving Picture Company of America, its agents, attorneys, officers, clerks, employees, servants and workmen from any further manufacture, use or sale in any manner of the said patented improvements or any part thereof, pending this cause.

21 6. That such other and further relief may be granted and decreed to your orator as the equities of the case may require and as to your Honors may seem meet.

MOTION PICTURE PATENTS COMPANY,
By GEORGE F. SCULL,
Secretary.

KERR, PAGE, COOPER & HAYWOOD,
Solicitors and of Counsel for Complainant.

PARKER W. PAGE,
Of Counsel.

State of New Jersey. { ss.:
County of Essex,

George F. Scull, being duly sworn, deposes and says:

I am Secretary of the Moving Picture Patents Company the complainant corporation named in

[PHOTOCOPY]

22 the foregoing bill of complaint; I have read the said bill of complaint and of my own knowledge know it to be true, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

GEORGE F. SCULL.

Subscribed and sworn to before me this 9th day of February, 1910.

23 ANNA R. KLEHM,
Notary Public,
State of New Jersey,
Commission expires June, 1913.

CIRCUIT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF NEW YORK.

24 MOTION PICTURE PATENTS COMPANY,
Complainant,

vs.

INDEPENDENT MOVING PICTURE
COMPANY OF AMERICA,
Defendant.

The replication of the above-named complainant to the answer of the above-named defendant.
The repliant, saving and reserving to itself all and all manner of advantage of exceptions which

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may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, for replication thereto saith that it does and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill it has already prayed.

Dated, New York, May 11th, 1910.

KERR, PAGE, COOPER & HAYWARD,
Solicitors for Complainant.

[PHOTOCOPY]

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William K. L. Dickson.

New York, April 10, 1911, 11 A.M.

Met pursuant to adjournment at the offices of
Kerr, Page, Cooper & Hayward, 149 Broadway,
New York City.

360

Present—PARKER W. PAGE, Esq., Counsel for Com-
plainant. MR. RICHARD EYRE, Counsel for De-
fendant.

WILLIAM K. L. DICKSON, a witness called on
behalf of the Complainant, having been first duly
sworn, deposes in answer to interrogatories by
Complainant's Counsel, as follows:

Q1. Please state your name, age, residence and
occupation?

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William K. L. Dickson.

361

A. William Kennedy Laurie Dickson, Consult-
ing Engineer, 4 Denman Street, Piccadilly Circus,
London. I am 49 years of age.

Q2. Have you ever known personally Mr. Wood-
ville Latham?

A. Yes.

Q3. When did you first become acquainted with
him?

A. In the early part of 1894.

Q4. What was Mr. Latham's business or occupa-
tion at the time you knew him?

A. When I first became acquainted with him, 362
he was interested in the purchase of Edison Kinetos-
copes and made such purchases from Mr. Edison
at that time. It was in my province to exhibit the
machines to purchasers and so I became acquaint-
ed with that gentleman and his sons.

Q5. Was Woodville Latham a scientific man?

Mr. Eyre: Objected to as irrelevant and
immaterial.

A. Yes.

Q6. Did you ever have any other business rela- 363
tions with Mr. Latham in connection with moving
picture apparatus other than that which you have
stated in a preceding answer? and if so, will you
please state fully what your relations with him
were?

Mr. Eyre: Objected to as it appears to
bring new matter into the case which is not
proper rebuttal testimony and notice is
given that at the proper time motion will
be made for leave to take testimony in reply
to this or any similar line of test-

[PHOTOCOPY]

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William K. L. Dickson.

mony or to expunge the same from the record, and it is agreed that this objection be made now once for all to any testimony of this character.

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A. As a brief preamble, prior to answering these questions in full, I would like to say that a few days ago, I read for the first time Mr. Woodville Latham's testimony in an interference in the Patent Office under the head of Woodville Latham vs. Thomas Armat and found same to my intense surprise, incomprehensibly vindictive. Had I known of this testimony, nothing would have kept me from coming over and correcting such statements, as I hope now to do, hoping that this may not be out of place.

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As stated before, I met Mr. Woodville Latham for the first time in the early part of (to the best of my knowledge) 1894, when he came to the Edison Laboratory to purchase six or more kinoscopes which he intended to use for exhibition purposes in New York. I found Mr. Latham to be a congenial spirit, owing to his scientific attainments and our friendship grew and throughout such acquaintanceship, we spent many evenings discussing the scientific questions of the day. One subject, however, was rigidly tabued, namely, moving photography. Professor Latham, I believe, was a man of letters, Professor at a Virginia College or University, a lecturer in Physics. Shortly after my meeting him at the Edison Laboratory, I invited him to my home and to cut this testimony as short as possible. I will now give the salient points that I presume may be of interest in this testimony, namely, Mr. Woodville Latham, shortly after I had made his acquaintance, asked

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me to recommend him a good mechanic without stating what he wished him for. I recommended a late employee of Mr. Edison, whom I knew to be a thoroughly capable man in his line. A week or so later, Mr. Latham called at my house, thanked me for the recommendation, remarking that he was just the man he wanted, and then for the first time, disclosed that he wished to carry out some idea he had in moving photography. This rather took me aback and I told him that I should never have recommended anyone to him had I known for what purpose he wished to use this mechanician. However, the deed was done and there was nothing more to be said. Mr. Woodville Latham then did his best to persuade me to come and join forces with them. This I steadfastly declined, owing to the fact that my position and interest with Mr. Edison were entirely satisfactory to me, and that the Latham proposition at that time was an unknown quantity. Sometime in October, 1894, Mr. Woodville Latham and his two sons, Messrs. Otway and Grey Latham, accepted an invitation to dine at my house, at 166 Cleveland Street, Orange, N. J. and after the guests had all left, Mr. Woodville Latham and his two sons made a proposition to me, in the presence of my wife, which was untenable, which, however, was modified and to which I agreed heartily, namely, that, as Mr. Woodville Latham was desirous of going into public exhibitions of the kinoscope, using same for projecting purposes, if on trial, it proved satisfactory, I should use my best endeavor to persuade Mr. Edison to give them the exclusive right for this special branch of the business, and that if I succeeded, I should have a substantial interest, subject of course, to Mr. Edison's approval. I signed such

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a letter, which was approved of by my wife, whose sense of right and wrong naturally was of the highest order.

I immediately set to work and arranged to make a trial at Columbia College, with the courtesy and in the presence of the Professors and one or two other gentlemen, Woodville Latham and his sons being invited. All the commercial kinetoscopes, were in use but I was able with some parts of an obsolete machine, to demonstrate and prove to my own satisfaction and that of Mr. Latham, and the others present, that if I succeeded in persuading Mr. Edison to make such a contract as previously stated, regarding the use of the Edison film and kinetoscopes, possibly with slightly increased opening in the shutter, and as intensely concentrated light as possible, all would be well. The short film and mechanism were, of course, replaced in Mr. Edison's laboratory and the next morning I did my best to persuade Mr. Edison to grant these gentlemen this privilege. Mr. Edison, however, pointed out to me that he had already bound himself to Messrs. Raff & Gammon. I need not say that my

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disappointment was intense and I called on Mr. Woodville Latham to acquaint him of my failure. It was then I learned from this gentleman that they intended therefore, to go into this whole business themselves and that he was going to carry out some ideas he had and construct machines to produce negatives and positives for projecting purposes. It is stated in the Woodville Latham-Armat testimony, among other things, that I was in his employ. This nonsensical, and for some hidden purpose, vindictive remark, I must emphatically deny, and while I have the opportunity, wish

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to state that at no time was I ever in Mr. Woodville Latham's employ, nor gave him any suggestion or ideas in connection with moving photography. I note in the Woodville Latham testimony that there is a mention of a Dickson Stop Mechanism which was experimented on and failed. The truth of the matter was simply this: That during one of our many scientific discussions, he caught me napping and I asked him if he had seen a curious stopping device for actuating a clock-work, which I described not having the slightest intention at the time that he should use this for the work on which he was engaged. I was careful not to ask him what he was doing or what his mechanism was, as I wished my relations with him to remain purely social. Mr. Latham seemed to jump at the conclusion that this would be most useful. I, however, pointed out to him I fancied it would be far too slow for his purpose, and that I certainly did not wish him to bring me into this business unless I decided to leave Mr. Edison and join them, which at present I had not the remotest idea of doing. During the months of December, 1894, and January, 1895, I had several opportunities of visiting on invitation, a shop which they had in New York and saw that they were in full swing, making so-called modified kinetoscope projectors. At the same time, they were working on an apparatus for taking negatives. I particularly avoided examining same and cannot testify as to the construction of this same mentioned taking machine until I received an invitation from Mr. Woodville Latham to come over as quickly as possible as he had something particularly interesting to show me. On arriving on the scene, I found Mr. Otway Latham, Mr. Gray Latham, Mr. Eugene

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Lauste and another workman very much excited and they proceeded to show me every detail of the before mentioned taking machine. A short piece of film was tried and I was asked to develop same which I did. Mr. Otway Latham for some hidden reason, asked me to write a note dictating the words "To my friend Woodville Latham, Compliments of W. K. L. Dickson," etc. If his object was to compromise me, he very nearly did succeed and so I fell into the trap, for as previously stated, throughout all these proceedings, neither by word or action, did I have anything to do with their work. After this, I thought it best to have as little to do with them as possible, until I had made up my mind if I should join them or not. The crisis came on April 2nd, 1895, when I was accused by an individual then in the employ of Mr. Edison, to the effect that my relations with Messrs. Latham were not honorable, etc. etc. That person had the pleasure of being confronted with Mr. Edison by me and asked to repeat the remarks he made to me. Mr. Edison's remark was, "I don't believe a d— word of it." I then insisted on Mr. Edison making his choice between the aforementioned person and myself, but either owing to Mr. Edison having contracted with this person, allotting to him full power or whatever it was, and the decision not being sufficiently whole-hearted, I lost my temper and resigned on the spot. The date, as previously given, was April 2, 1895. I then joined my own company, the Portable Electric Light & Power Company, and throughout the time I was engaged in this company, Messrs. Latham received from me occasional visits and towards May, I assisted in the taking of a glove contest on the roof of Madison Square Garden.

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Before closing this preamble, I might add, that I notice in the Latham testimony, that a certain amount of stock in the Lambda Company was given me. This is quite incorrect. The true facts of the case were these. Mr. Woodville Latham insisted in forcing this stock on me and which I as persistently refused, there being no *quid pro quo*, as long as I was engaged with Mr. Edison and not having done anything for the Latham Company. Until I left, I could not, of course, take something for nothing. As I was still towards the last undecided, if I should join them or not, at the advice of my solicitor, Mr. Edmond Congar Brown, of New York, I sent Mr. Latham to him and learned after that Mr. Brown decided in my interest to hold such stock in trust, pending the time that I should decide to join them.

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In conclusion, to this rather lengthy preamble, I am fortunately able, even although I learn with much regret, that the Messrs. Latham have passed on, to give an account of themselves elsewhere, that I have other witnesses who can substantiate all I have said in regard to the personal slander which I need not say, has very much upset me.

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I take this opportunity of apologizing, at the same time thanking Counsel on both sides, for their kind indulgence.

Counsel for defendant states that he is hardly in a position to accept the thanks of the witness as he feels that he must now object to the answer as being incompetent, as bringing in reference to testimony which has not been given in this case and which cannot be duplicated in this case, since it

appears that Latham, whose prior testimony in interference was criticized, is dead. The answer is further objected to as irrelevant and immaterial.

Recess.

After Recess.

Q7. You state in your last answer that you were employed by Mr. Edison in 1894 or 5. In what department were you at Mr. Edison's place?

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A. The Electrical Mining or Milling Department and the Moving Picture Photographic Department.

Q8. How much experience did you have with the apparatus and the processes practiced in the Moving Picture Department?

A. In 1887, Mr. Edison asked me if I understood photography. I replied I did, also the chemistry of photography. He then proposed to start a department in which I was to have exclusive charge developing his ideas in moving photography, which I did from that time on until I left him.

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Q9. And you left him, as I understand it, April 2, 1896?

A. That is right.

Q10. You have also referred to seeing a camera or taking machine in Woodville Latham's shop. I wish you would now state in as much detail as you can the exact circumstances connected with the incident, giving as far as you are able, the dates when you first saw that machine sufficiently to understand its construction?

A. I received a letter of invitation from Mr. Woodville Latham a month or so before I left Mr. Edison in which letter Mr. Woodville Latham

urged me to come over as soon as possible to see what they had accomplished. I found those present Mr. Otway Latham, Mr. Gray Latham and Mr. Eugene Lauste, a workman. There may have been others, but I do not remember, except that I understood Mr. Woodville Latham was not well on that evening, as I recall. In the centre of the room or shop the taking machine, which I was aware had been worked on for some time past, was apparently finished, judging before I was shown the interior by the general excitement of those present. With a flourish the cover was lifted displaying an upright mechanism composed, to me on first impression, of endless rollers, sprockets, etc. On examination and witnessing the run made by Mr. Eugene Lauste, Mr. Otway Latham assisting in threading a piece of (what appeared to be) spool film, I noticed that this piece of film was passed over a sprocket wheel, the film being held in place by a roller pressing against the sprocket wheel holding the film in position. From this sprocket a loop was formed, and passed to a second sprocket, the film being similarly held in position by a roller, the film was next carried through a window gate. Below the window gate the film was passed over a sprocket wheel, the film held in position by another roller. From this sprocket wheel the film formed a loop and was placed over a fourth sprocket wheel again similarly held by a roller. I noticed that next to the lowest sprocket wheel, which I might count as the third sprocket wheel, was rigidly attached to a Maltese cross stopping device which I understood at the time was to be their method of stopping and starting the film. This third sprocket wheel was fast-

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ened in some way with the second sprocket wheel immediately above the gate and the two outside sprocket wheels 1 and 4 were similarly attached. After running through this short piece of black appearing film the box was taken into the dark room situated at the end of the shop, and Mr. Otway Latham and one other, presumably Mr. Eugene Lauste, threaded the machine with some sensitive unexposed film. This was brought out of the dark room and the question arose how to make a record on this film. I found, however, that it had been settled to photograph the filament of an incandescent lamp and someone present suggested swinging same during the exposure. I was asked to turn the handle, I stupidly did, and further adding to my stupidity by not being able to see through their purpose, developed for them a short piece of the exposed film in the previously mentioned dark room, tearing off a piece of about six inches long, the result being a sharply focused and clearly defined image of the carbon filament standing out in black relief against a more or less mottled background. 389

390 Mr. Otway Latham wished his father, who was ill at the Bartholdi Hotel, to have that night the first sample and asked me to pin this to a piece of paper, he himself dictating the words which I remember perfectly to be "To my friend Woodville Latham, compliments of W. K. L. Dickinson." I should not have remembered the exact date and hour of this note had not my memory been refreshed by reading Mr. Latham's testimony but I am absolutely certain that in every detail this event took place at midnight or thereabouts a month or more prior to leaving Mr. Edison, which date as we know was April 2, 1888.

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Q11. Where was the shop where the above occurrences took place?

A. I can only remember it was a broken down looking place in Franklin Street, New York, the shop, however, seemed to be well equipped.

Q12. Will you describe a little more fully the location of this shop which you say was on Franklin Street?

A. I am afraid that that is more than my memory will assist me in at this late date, but owing to the circumstances connected with this to me more or less disagreeable business the name of Franklin Street is deeply impressed on my mind.

Q13. Was this in New York City?

A. New York City, yes.

Q14. Can you tell where that street was located with references to some central point say the City Hall?

A. I am afraid I cannot. It certainly was in the lower portion of New York.

Q15. Mr. Lauste has given testimony in this case. Were you present at the time that he gave his deposition?

A. I was.

Q16. Lauste says that the Latham shop was on Frankfort Street. Was he mistaken in this?

A. Mr. Lauste was quite right. It was certainly Frankfort, now that the matter is brought to me. Q17. Did you in writing the note at Mr. Otway Latham's dictation attach any date to it?

A. I did, both date and hour.

Q18. Was the date which you wrote that of the day on which the experiment was tried?

A. Yes, about 10 minutes after the short piece had been developed, and in fact the piece of film

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was lying on a piece of blotting paper at our side.

Q10. I show you now the sketch Mr. Lauste made at the time of giving his deposition in this case and which is in evidence as Complainant's Exhibit Lauste Sketch. Will you please state in what respects, if any, that sketch illustrates the construction of the feed mechanism of the camera as you saw it on this occasion at the Frankfort Street shop to which you have just testified?

385 A. The sketch I hold in my hand is undated and purporting to be a sketch made on the Hotel Brevoort letter head, the sketch representing a series of rollers and sprocket wheels and a side sketch of a Maltese-cross stop motion. This I was aware had been drawn and put in evidence at the time of Lauste's testimony. The sketch appears substantially to be what I observed at that time but I do not recollect the exact mode of attaching the various sprocket wheels together and presume this was substantially what I saw with the exception of a roller which is drawn on the top of the first sprocket wheel. This I did not see at the midnight test.

386 Q20. Using this sketch as a matter of convenience, will you please state how the first and fourth, that is the upper and lower sprocket wheels in the taking machine as you saw it at the time of the midnight experiment were driven; that is to say, was their motion intermittent or continuous?

A. I am sorry I cannot help you very much in regard to this for I do not remember the exact method adopted at that time to run these said mentioned first and fourth sprockets. They were, however, working in unison continuously, not intermittently, and presumably belted or geared as shown in the sketch, which is quite likely.

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Q21. I did not mean to inquire as to the specific devices for driving them, but only as to the character of their motion, and as to this your answer is what?

A. That the first and fourth sprockets shown in the sketch and as seen by me at that time were running continuously and not intermittently.

Q22. And how was it with the second and third, or the two intermediate sprockets, what was the character of their movements?

388 A. Intermittently running sprocket wheels. Q23. Did you make any estimate at the time of the rate at which you operated this camera?

A. Yes, and in fact we had a lively discussion and I think my estimate was accepted, as being perhaps the only one present who could judge, though roughly, of the speed at which the picture was taken, which I estimated, considering how the machine was geared, to be about half the speed at which we ran the Edison kinetograph, which kinetograph was run about 40 to the second.

Q24. As to the conditions of operation and finish of the machine on the night in question, what have you to say?

389 A. I am afraid very little, if anything, but I never saw that machine again for some time after I had left Mr. Edison. The machine, however, appeared to be constructed on two uprights with the rollers and sprockets one above the other, the gate or film carrier being centralized between the four rollers, two sprockets above and two below.

Q25. Was the machine on the night when you first operated it in such condition that it could be used practically for the taking of moving pictures?

Objected to as calling for a mere conclusion and indefinite.

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A. I felt convinced and somewhat troubled that we had a serious competitor especially so on examining the consecutive views of the filament awaying lamp. I examined the film closely with a lens and found perfect definition, and except for a slight halation due to the intensity of the light filament, but I considered at the time that the machine would answer the purpose for which it was intended.

401 Q26. You have spoken of assisting in photographing a glove contest on the roof of the Madison Square Garden. Do you remember the names of the contestants in this contest?

A. I do. Griffo and Barnet.

Q27. Do you remember when this contest took place?

A. Shortly after I left Mr. Edison.

Q28. You do not recall the precise date?

A. I do not.

Q29. What machine did you use for taking these pictures?

A. The same that I tested on the lamp filament.

402 Q30. You mean the machine you first used at the Frankfort Street shop?

A. Yes.

Q31. Was the machine when you used it for photographing the Griffo and Barnet fight in the same condition as when you photographed with it the swinging incandescent lamp in the Frankfort Street shop?

A. Yes, but with the exception that I added, or suggested that they should add, a supplementary roller on the upper sprocket wheel. The effect of this roller, I judged, would be to allow the film to have a better grip on the teeth of the sprocket

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wheel. In other words, I made this suggestion to obviate any possible tearing out of the perforations, as they were intending to use a very heavy film.

Q32. And this supplementary roller you think was in the machine when you photographed the Griffo and Barnet fight?

A. Yes. This roller I judged necessary and my suggestion was carried out a day or two before the fight, tested and proved efficient.

Q33. You heard Lauste's testimony on this point and you do not agree with his recollection of it?

404 Objected to as improper, the witness should simply testify to his own recollection without reference to what Lauste may have said.

A. I recollect his testimony, being present, and would have corrected it at the time but naturally I should have been out of order. The roller was placed on the machine a day or two before the fight.

Q34. Do you recall how much film you used in photographing the Griffo-Barnet fight.

405 A. Not from recollection as to the specific amount used, but it seemed to me it was a very large and heavy roll, sufficient to take several rounds or bouts.

Q35. Approximately how long was that film if you can state?

A. I am unable to state correctly the length as I did not measure it, but remember it took a very long time to reel it up in the dark room, the reel appearing to be seven or eight inches or perhaps more in diameter.

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Q36. How did the width of film used in this machine compare with that manufactured by Edison for use in his kinoscope?

A. It was considerably wider than the Edison kinoscope film.

Q37. Have you preserved any specimen of that film and if so, will you please produce it?

A. I have. I now hand you a film which I found among my film collection in London purporting to be a piece of film of the Griffo-Barnet light taken on the roof of Madison Square; size without perforations inch and a half by three quarters of an inch, which I hand in evidence.

Q38. That is to say, the size of the pictures is an inch and a half by three quarters of an inch?

A. Yes.

Q39. Has this film been trimmed, that is to say the edge cut off?

A. Yes.

Q40. Did it originally have perforations on each side?

A. Yes.

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The piece of film produced by the witness is offered in evidence and marked Complainant's Exhibit Film of Griffo and Barnet light.

Q41. Do you know what became of this taking machine after it was used for photographing this Griffo and Barnet light?

A. I do not. As I left very shortly after the taking of this picture, not being satisfied with Messrs. Latham methods as far as I was concerned, joining the Autoscope and Biograph Company, of which I became a member. The only explanation

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I can give why these gentlemen testified later in such a vindictive manner was perhaps due to my leaving them high and dry and joining the Biograph Company.

Q42. Have you had any experience in reading the drawings of patents illustrating mechanical devices?

A. Yes.

Q43. Please look at the patent to Latham which is here in suit and Complainant's Exhibit Latham Drawings which is a full sized reproduction of the original drawing of that patent, and consider particularly Figs. 2 and 6 of that patent, and state, as far as your present recollection will permit, how the taking machine which you used to photograph the swinging incandescent light in the Latham shop on Frankfort Street, and afterwards used to photograph the Griffo and Barnet light, differed from or resembled the machine which is illustrated in the figures to which I have called your attention?

A. Fig. 2 purports to be a projecting kinoscope. I cannot say very much about it although I know they were working on something of this order. Fig. 6 is called a projecting kinoscope. Fig. 6 shows practically what I saw at that date as far as concerns the arrangement of sprockets and rollers illustrating an upper and lower loop, but this illustration 6 is not as I saw it at that time. For some reason or other the teeth are omitted on number 55 and the film did not pass over the roller set so far back as 56. This evidently was drawn sometime after, and the roller 56 which I devised is taken on 46, answering, however, almost the same purpose. In the machine that I tested at the time, the film came straight down. I notice in the

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sketch, although indicated, the stop motion is not illustrated except in Figure 5, which naturally belongs to this apparatus of Fig. 6. While called a projecting kinoscope naturally could also be called a taking machine.

Q44. Do you know what became of that taking machine which you used to photograph the Griffo and Barnet fight?

A. I haven't the remotest idea.

Q45. How long after you left Mr. Edison April 2, 1895, were you associated in any way or negotiating with Mr. Latham and those interested with him?

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A. I do not remember being associated with the Lathams even after leaving Mr. Edison, except in a friendly way to give them a helping hand whenever I could, such as the taking of the Griffo-Barnet fight, for the simple reason that I soon became disgusted with their business methods as previously stated and sought other fields. And they behaved as gentlemen I most likely should have thrown myself heart and soul into the work, taken up the stock held in trust by my solicitor and joined them in their work. It is fortunate, however, that I did not, and therefore authorized my solicitor to return them the stock.

414

Q46. Did you ever have any conversation with Mr. Woodville Latham after you left Mr. Edison on the subject of moving picture apparatus?

A. Yes.

Q47. What did you find as to the extent of his information on this subject?

A. I found him to be well conversant with the art as far as it went at that time and thought he was capable of originating new ideas and might arrive at some good work outside of what he had

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already accomplished and even then, hesitated if I should throw in my lot with him; his personality and that of his sons, however, knocked that on the head.

Answer objected to as incompetent being merely the opinion of the witness as to possible capacity of Latham to produce hypothetical results at some time.

Adjourned to Tuesday, April 11, 1911, at 11 o'clock A. M.

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New York, April 11, 1911, 11 A. M.

Met pursuant to adjournment.

Present: Counsel as before.

Examination of Mr. Dickson continued:

Q48. How long before you took the pictures of the swinging incandescent lamp in the Frankfort Street shop, had you any knowledge of the camera used on that occasion and what was the extent of that knowledge?

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A. I am afraid I cannot be of very much use in giving you any description or exact dates, but to the best of my knowledge I was aware that a taking machine was in process of construction shortly after Christmas, or to be absolutely certain, we might say during the early part of January, 1895.

Q49. How did you obtain this knowledge?

A. I remember calling on Mr. Woodville Latham at the shop in Frankfort Street about that time.

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Q50. Did you see this machine in the shop at that time?

A. I did, and Mr. Lauste was busy with same. I could not, of course, nor did I feel it right to examine any of the work, as long as I was not connected with them.

Q51. What kind of a man was Professor Woodville Latham? Please tell us anything that you know about the character of his attainments, ingenuity or the like, that you may have observed during your acquaintance with him?

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Objected to as incompetent. The making of a specific invention cannot be proved by evidence as to character and attainments.

A. I found in Mr. Woodville Latham a congenial spirit as stated before, in as far as scientific attainments were concerned. Our discussions were mostly based on general physics and what he himself had accomplished in his life in regard to what he termed "inventions" and various ideas he had. He spoke of different apparatus that he had invented, but, of course, I do not know if there were any patents. It struck me that he was highly theoretical and his anxiety was that I should join forces with him in this particular work he was then engaged on. This, of course, being out of the question, other subjects were more fully discussed and I must say I was much impressed, being perhaps a little younger at that time, with the amount of information he had acquired.

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Q52. Have you known Eugene Lauste for a long time?

A. Yes.

Q53. When did you first know him?

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A. Eugene Lauste worked at Mr. Edison's laboratory for several years as mechanic, engaged in work of precision such as electrical apparatus for Mr. Edison and then left, seeking employment at the Edison Ore Milling Works at Odgen, New Jersey, which he found distasteful and remained out of employment some time. It was at that time that I recommended him as a skilled mechanic to Mr. Woodville Latham, he, Mr. Woodville Latham, not disclosing to me what he wished this mechanic to do for him, as already stated.

Q54. Do you know whether Lauste, at the time he entered Mr. Woodville Latham's employ, had had any practical experience with moving picture apparatus?

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A. None whatever. In fact, no one was permitted to come within the sanctum sanctorum of the moving picture department. I notice that in Mr. Lauste's testimony he states that he did see the exterior of a kinesiograph and I remember the circumstance very well. I issued a general invitation to everyone in the laboratory to view a scene, perhaps one of the first, if not the first, in a rough box-cabinet shaped kinesiograph, the subject being "horseshoeing."

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Q55. Did you ever impart to Mr. Latham directly or through any other source any of the features of construction which you found embodied in his camera when you examined the same at the Frankfort Street shop on the occasion of photographing the swinging incandescent lamp?

A. Decidedly and emphatically, no, neither by word or action.

Q56. Prior to the night when you photographed this swinging incandescent lamp at the Frankfort Street shop, had Mr. Latham ever expressed to you

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any satisfaction or dissatisfaction with Lauste's work for him?

A. He expressed himself as being very well satisfied with Mr. Lauste and stated that the work was going on beautifully, or something to that effect.

Q87. What nationality is Lauste?

A. French born, a Parisian.

Q88. Does he speak English fluently?

Mr. Eyre: Objected to as incompetent, and as not the best evidence.

425

A. No, in fact, it has always been a surprise to me why the English language was so difficult. The only explanation I can give is that his hump of languages must be represented by a cavity.

Q88. Did Mr. Latham ever give you any intimation of whether Lauste was carrying out his, Latham's, ideas in the work that he was doing for him?

Mr. Eyre: Objected to as secondary evidence.

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A. Yes, he seemed to be always very pleased and thought that Mr. Lauste was a most capable mechanic and just the man he wanted (to quote his own words) to carry out his ideas.

Direct-examination closed.

Mr. Eyre: In view of the fact that the only apparent purpose for the testimony of this witness, and certainly the main purpose of his testimony is, to make an attempt to prove some early date of alleged invention

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by Latham and in view of the further fact that the only testimony thus far adduced by the complainant, relating to the camera for taking machine to which the witness has referred, has been testimony to the effect that the alleged invention was made by Lauste and not by Latham, the right is reserved to call for the production of the witness for additional cross-examination in case further testimony should be offered tending to show the making of the alleged invention by Latham specially if it tends to show any disclosure of the invention by Latham to this witness; and the testimony of this witness is objected to as irrelevant and immaterial unless such further testimony be adduced.

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Counsel for Complainant replies that he perceives neither the point nor propriety of the above objections and states that all of the facts and knowledge in his possession with regard to the invention of the patent in suit by Latham is now in the possession of counsel for defendant, counsel for defendant having yesterday stated that he had in his possession a copy of the Interference proceedings in the case of Latham vs. Armat. Counsel further states that Woodville Latham, his two sons, Otway and Gray Latham are dead and this fact will be duly proved. If there are any other living witnesses capable of testifying with regard to the making of this invention by Latham, Counsel for Complainant has no knowledge of their whereabouts, although a most diligent search has

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been made to ascertain if there be any such witnesses. Having all the facts before him which counsel for Complimental knows of or believes to be pertinent, counsel for Defendant is at liberty to proceed in the usual course followed in such cases.

Cross-examination de bene esse:

431 XQ00. In giving the date, April 2nd, 1895, as the date when you left Edison, are you basing your statement upon your personal recollection?

A. No.

XQ01. What are you basing it on?

A. I have a copy in my possession of my resignation to Thomas A. Edison, witnessed by my foreman, who was present at the time, the document reading in the usual form, dated April 2nd, 1895, and witnessed; which document I can show, on demand.

XQ02. Did your resignation take effect at once?

432 A. At once, although I had one or two interviews unofficially with Mr. Edison within the next day or two, in order to clear things up which I stated before was done to my and Mr. Edison's entire satisfaction.

XQ03. You moved your ⁴³³ belongings from the Edison Laboratory that same day?

A. Oh, no.

XQ04. How long after?

A. There was no desperate hurry and my belongings were few, if any, with the exception of a few personal photographs that I had taken of my wife, sister, niece, dog, I forget if there was a cat picture; otherwise, I do not think there was anything else. These were removed within the next day or

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two, to my house, at 166 Cleveland Street, Orange, New Jersey.

XQ05. Did you go to the Edison Laboratory at all after the first week of April, 1895?

A. No, but to Mr. Edison's house on one occasion.

XQ06. After April 2nd, 1895, what occupation did you engage in and when did you begin?

A. I joined a small company which I formed with Mr. Llewellyn H. Johnson, which we termed the Portable Electric Light & Power Company.

XQ07. When was that company first formed?

434 A. It was more in the order of a partnership between that gentleman and myself, he, the financier, I, the technical adviser. This I acquainted Mr. Edison with, and hoped even then, if needed, would have his support. About that time however, I met my old friend of early Edisonian days, Mr. H. N. Marvin, and being thoroughly disgusted with the business methods of the Lathams, after taking the Griffin-Barnett fight I threw up both the matters and joined Mr. Marvin in a new moving photographic venture. This took place, to the best of my recollection, about two months after I left Mr. Edison. Regarding the Portable Electric Light & Power Company, so-called, we were more or less dependent upon the Chloride Accumulator Company for a specific kind of plate, which I had designed. Mr. Gibbs, the General Manager, came to my house, at Orange, New Jersey, and that of Mr. Johnson, to arrange for these plates and general contracts. Mr. Johnson was then allowed to carry this on, if he chose, when I joined, as stated before, Mr. H. N. Marvin and his associates.

XQ08. My question was only as to when the

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Portable Electric Light & Power Company was formed, and I do not think you have told me yet.

A. I did state that it was a partnership more than a company, but for convenience sake, we called ourselves a company.

XQ69. Well, that does not tell me when the partnership which for convenience, was called a company, was formed?

A. I don't know that I can give any exact date. It was certainly within a week or ten days of my leaving Mr. Edison that Mr. Johnson and I arranged this so-called Company.

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XQ70. Before or after?

A. After.

XQ71. What, if you know, has become of Mr. Johnson?

A. I haven't the remotest idea.

XQ72. What was the last that you know?

A. Sometime in that same year, 1895.

XQ73. What was his then location and occupation?

A. Mr. Llewellyn H. Johnson lived in East Orange and was connected with the Bicycle Hollow Tube Company.

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XQ74. What did you and Mr. Johnson, using this company name, intend to do?

A. Portable storage battery lamps for mining purposes and general portable use under a patent which I took out at that time for a parabolic reflector and current controlling device.

XQ75. That was the only business you had in mind for your partnership?

A. That was the only business we had in mind.

XQ76. Just what did the business methods of the Lathams have to do with your deciding to give up this partnership venture with Mr. Johnson?

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A. Neither the business methods, so-called, of the Lathams nor my relations with Mr. Johnson had anything to do with my decision to join an old and trusted friend, namely, Mr. H. N. Marvin. I found, as stated before, with regard to the Johnson-Dickson combination, that as we depended almost entirely on very light plates for portable purposes to work in conjunction with my patent lamp, we were disappointed that Mr. Gibbs could not produce a sufficiently light plate to give us the capacity required so we were forced to abandon that particular plate and look elsewhere. This took some time and we allowed the matter to drop *pro tem*, until such time as we could find a light plate. Meanwhile, I made several of these lamps which were used with the heavier battery provided by the Chloride Accumulator Company. As for the Lathams, I gave them such help as I deemed necessary, such as taking the same old picture, recited several times in this evidence and as I got to know them better, it was quite clear to me that further association with them would be distasteful. Mr. Marvin and Mr. Edmund Cougar Brown, my solicitor, were my business confidants and they agreed with me not to go too fast, as far as binding myself to the said Lathams, and as stated before, I joined Mr. Marvin as a certainty and I have had nothing to regret since that decision. What has been done with my patent lamp, I do not know, I do not care.

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XQ77. You have stated (answer to XQ67) "About that time, however, I met my old friend of early Edisonian days, Mr. H. N. Marvin, and being thoroughly disgusted with the business methods of the Lathams, after taking the Griffo-Barnet fight, I threw up both the matters and joined Mr. Marvin in a new moving photographic ven-

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ture." I judge from your last answer that this quoted statement is not entirely correct or as you intended it.

A. I must confess I do not quite see what you are driving at. I certainly preferred to deal with a noncommittal and agreeable business and the offer was such that I considered at the time it was best for me to accept Mr. Marzin's offer.

XQ78. How long did you continue associated with Mr. Marzin's Company?

443 A. Until the present date. The association still continues, under the heading of K. M. C. D. Syndicate.

XQ79. What relation, if any, has that company with the Biograph company or the same company or predecessors under different names?

A. There was naturally no name given just at that time but shortly after we had together with two other friends of Mr. Marzin in Cinematograph, New York, to dub the syndicate, K. M. C. D. Again shortly after the Mutoscope Company was formed, followed by the title The Mutoscope & Biograph Company.

444 XQ80. And what is the present name of the concern with which you are connected?

A. To be more explicit, the K. M. C. D. was the parent syndicate in which we had our various interests allotted. All other companies throughout the world, under the head primarily of the Mutoscope Companies and later of the Mutoscope & Biograph Companies were owned or controlled by the parent K. M. C. D. syndicate.

Recess.

XQ81. When you say that the Portable Electric Light & Power Company was more of a partner-

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ship than a Company, do you mean that there were no company organization papers filed?

A. To the best of my knowledge, that is right.

Nothing was filed.

XQ82. What, if anything, occurred after November, 1894, and prior to the time that you saw the pictures of the swinging incandescent lamp affecting the character of your relations, either with Mr. Edison or with the Lathams?

A. There was nothing that could have affected either my relations with Mr. Edison or with the Lathams, if looked at in the proper light.

446 XQ83. Did anything occur during that interval which made you feel any differently as to your duties or loyalty in connection with Mr. Edison?

A. Nothing.

XQ84. I have understood from your testimony that while you were at the Latham shop, at times prior to the swinging light episode, you were careful in view of your connection with Mr. Edison, to avoid learning the details of what was being done in the Latham shop, but that at the time of the swinging light episode, you permitted all details of the camera to be shown and explained to you. If I have stated correctly, will you please explain why you were willing to examine this camera, etc. on the later occasion and not willing to learn what was going on on earlier occasions?

447 A. You have stated this quite correctly and the simple explanation is that the showing of the complete camera was forced on me and it was then or about that time that I was trying to make up my mind if I should go into the exhibition business or not. For that reason, I thought it wise to see what they had.

XQ85. Have you retained in your possession the

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letter that Mr. Latham wrote asking you to come over?

A. No, I have not.

XQ86. Did you destroy it and if so, when?

A. When I removed to England from my home in Orange, there was a general clean-up, of course, and presume all useless stuff was destroyed.

XQ87. Do you believe it was destroyed then?

A. Yes.

449 XQ88. How long had you had it in mind before the time that you saw the swinging incandescent lamp photographed that you might go into the exhibition business?

A. As explained some time back, it was my intention with Mr. Edison's approval, to go into or participate in the exhibition business, Edison explained previously, could not be granted, owing to a contract Mr. Edison had made with Messrs. Raff & Gammon; after that I was quite undecided what to do. I did not enter into any agreement with the Lathams.

450 XQ89. At the time of the swinging lamp episode, you knew that if you should connect yourself with the Lathams, it would be as a competitor to Edison, did you not?

A. Quite so.

XQ90. You were at that time thinking that you might connect yourself with the Lathams, were you not?

A. Yes, though very doubtful.

XQ91. When you say, that because you were at that time trying to make up your mind whether or not you should go into the exhibition business, you therefore thought it wise to see what the Lathams had, you mean, do you not, that you were trying to

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make up your mind whether to go into the business with them?

A. Yes.

XQ92. How long had you been considering going into the business with the Lathams as competitors to Mr. Edison?

A. Hard to tell. Off and on, I suppose, for some months.

XQ93. Probably as early as the time that Mr. Edison declined to make any arrangement with the Lathams?

A. No.

452 XQ94. How many visits did you pay to the Lathams' shop prior to the swinging light episode?

A. Difficult to say.

XQ95. For what purpose did you make these visits?

A. My visits to Mr. Woodville Latham at the shop or at the Bartholdi Hotel or Mr. Woodville Latham's visit to my house were more or less social. In these visits the constant refrain was "Come with us, work with us. I will make your fortune." If the question is leading to, if I gave any instructions or was connected with them in any way as to giving ideas or assisting them, this may be dismissed once and for all, this not being the case.

453 XQ96. This constant refrain of the Lathams as to your coming with them related to moving picture business all through, did it not?

A. It did.

XQ97. After your first talk with Mr. Edison, suggesting a possible arrangement with the Lathams, when did you next talk with Mr. Edison about what the Lathams were doing?

A. There was no talk with Mr. Edison after that, for quite some time.

XQ98. "For quite some time" is very indefinite. Give me the best idea you can as to how long it was.

A. Possibly about two months or so before I left, in which I told him that we might have a competitor in the Lathams. I think Mr. Edison's answer was a shrug of the shoulders.

XQ99. Prior to April 2nd, 1895, did you tell Mr. Edison anything as to the camera you had seen and the picture of the swinging light?

155 A. No, decidedly not.

XQ100. When the Lathams forced you to look at this camera, they knew you were working for Edison. Did they ask you to promise to keep the information secret?

A. No.

XQ101. Who was the individual who accused you to Mr. Edison of having had dishonorable relations with the Lathams?

A. W. E. Gilmore.

XQ102. What was it that he said to Mr. Edison about you, so far as you know?

456 A. I do not know, except that I had some relation with them, inferring that there was something incorrect in those relations.

XQ103. Why didn't you tell Mr. Edison what you had seen at the Lathams' shop?

A. Had I done so, I think it would have been incorrect. I could only say, as I did, as stated previously, that we may have in these people a competitor.

XQ104. Wasn't it at least a reason for not telling him the fact that you were then thinking you might join the Lathams and it would be to your interest if such event occurred, not to have Edison

know what had been done in the Lathams' shop any sooner than possible?

A. There is a good deal of truth in what you say but the thought of joining did not occur until some time after. I commenced to realize or the night of the lamp test when I was invited to see that they were seriously engaged, that I might join in the exhibition branch of the business which had been lost sight of by Edison in putting out the kine-toscopes.

XQ105. Do you mean by your last answer that it was some time after the night of the swinging light test that you first thought of joining the Lathams?

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A. It was on the night of the test.

XQ106. It was on the night of the test that you first thought of joining the Lathams.

A. I first seriously thought of joining the Lathams.

XQ107. But, you had been thinking of joining them for several months—perhaps less seriously—had you not?

A. No, I cannot say that, if at all, feebly.

XQ108. Your visits to the Latham shop were generally in the evening, were they not?

459

A. Naturally.

XQ109. When you visited the shop, did you frequently talk to Leuste in French?

A. Occasionally, of course.

XQ110. How large a shop was it?

A. Not very large.

XQ111. Well, give me the best idea you can.

A. I have very little recollection of the size, possibly about 12x15, or maybe more.

XQ112. Was it all one room?

A. There was a small dark room at one end.

XQ113. But there was no separate office?

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A. Yes, there was a sleeping room, if I remember right which answered the purpose of, I presume, office, dining room and bedroom.

XQ114. That was where Lauste slept, wasn't it?

A. I believe so.

XQ115. What was the name of the street that was deeply impressed upon your mind?

A. Franklin or Frankfort.

XQ116. You are not sure which, are you?

A. Yes, quite sure, since I was reminded. It was not Franklin but Frankfort.

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XQ117. What were the business actions of the Lathams that made you find it impossible or undesirable to make any definite connection with them?

A. In deference to the death of all three parties concerned, namely, Mr. Woodville Latham and his sons, Grey Latham and Otway Latham, I do not think it would be necessary, if you can do without the answer, to push this question further.

XQ118. I am sorry, but under the circumstances of the case, I do not feel like yielding to the reasons you give and must ask you to answer the question.

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A. My idea that morals and business should go hand in hand decided me, and as these gentlemen were not leading the sort of life that I was brought up to believe in, it made me feel that the less I had to do with them, the better.

XQ119. Do I understand that your last answer has relation rather to the personal morals of the Lathams than to the business actions about which I asked?

A. I do.

XQ120. Please understand that I have not the

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slightest desire to drag into this case the personal morals of anyone and have not asked you that. In your answer to Q45, you said, that you "soon became disgusted with their business methods." What business methods were there that you became disgusted with?

A. Nothing definite or no definite proposition was made as to our future relations, should I join.

XQ121. You have not answered my question, which asked, what the business methods were that you referred to in your answer to Q45 as having become disgusted with.

A. As stated in my last answer, no definite arrangement as to fees could be reached.

XQ122. And was this the business method that you were referring to as being disgusted with?

A. When I made that answer, it was principally coupled with an answer I made previously which was, as I understand now, not intended to be drawn from me by you.

XQ123. Then so far as the actual business acts of the Lathams were concerned, there was really nothing you were disgusted with?

A. In addition to what I said, I didn't consider that they were businesslike.

XQ124. Didn't they make you any definite proposition with relation to how you would benefit by joining them?

A. I presume you mean in regard to the shares which they endeavored to force on me during my engagement with Edison with the distinct, to me, object of compromising me. This perhaps, may add something towards my meaning "disgusted with their business methods."

XQ125. When did they force this stock upon you?

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A. Or tried to—the best of my recollection, this was shortly after the memorable lamp test.

XQ126. Hadn't you had any previous agreement of any kind with the Lathams or any of them, either written or verbal?

A. None whatever, except the one mentioned in my preamble.

XQ127. Did that agreement set out a definite interest in the business for you?

A. No.

467 XQ128. Did the letter that you signed at your house in October, 1894, state that it was subject to Mr. Edison's approval?

A. The agreement, if it is desirable to call it so, was contained in two or three lines, to the effect that I would use my best endeavors to persuade Mr. Edison to give them the exclusive rights to use the Edison film for projecting purposes and that should I succeed, I should have a substantial interest from the proceeds of such exhibitions. At that time, there was no thought other than that Mr. Edison should supply these films.

468 XQ129. Did Mr. Brown hold the stock for you in trust by virtue of any trust agreement or other document which would specify the terms on which it would be delivered to you?

A. None whatever, to my knowledge, unless my legal adviser got them to do something of that kind, pending my decision.

XQ130. He took this stock before you left Edison, did he not?

A. Yes, to hold or to return, as the case might be.

XQ131. And how was that to be decided?

A. As already explained, if I found that the ex-

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hibiting business would pay best, naturally I had the choice.

XQ132. Without your paying anything for it, and without having received any consideration from you, the Lathams had insisted upon giving Mr. Brown this stock in trust for you and you could have it delivered to you at any time you desired. Is that a correct statement?

A. No, quite incorrect. Mr. Brown's object was to hold the stock so as to insure my future the moment I left Mr. Edison. The Lathams' object, however, was to try and force the stock on me, for me to accept same, during my sojourn with Edison, presumably to compromise me and force me to join them as quickly as possible. Had I accepted the stock, I should have had to join the Lathams before knowing if the business were good or bad.

XQ133. Which part of my statement is incorrect?

A. I mean that the incorrect part of this relates to my receiving stock without a *quid pro quo*. The stock was to be my remuneration for joining them and as I stated before, they tried to get me to take this stock before I had accomplished anything for them, their object being to get me to leave Mr. Edison forthwith.

471 XQ134. Didn't you authorize Mr. Brown to hold the stock for you?

A. Yes and rightly too.

XQ135. Then during the following month, while Mr. Brown was holding this stock, which you could demand the delivery of at any time, you continued working for Mr. Edison, undecided whether to take the stock and leave him or whether to direct the return of the stock and stay with him. Have I got that much correct?

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A. Quite right.

XQ136. Then when you left Mr. Edison on April 2nd, 1895, how frequently were you at the Lathams' shop?

A. Whenever I thought fit to go to see how they were getting on and to give them such help as was necessary preparatory to the proposed Griffo-Barnet boxing match, which we all thought would give the best test of the capabilities of the machine in question.

473 XQ137. What, if any use, was made of the Griffo-Barnet film?

A. Mr. Latham and his sons hired a place on Broadway and used one of the kinetoscope projectors, inviting the public to witness the display.

XQ138. Were you there and saw it?

A. I was.

XQ139. The Griffo-Barnet film that you produced yesterday is a positive taken at some later time, from the negative which you took of the Griffo-Barnet fight. Is that right?

A. Yes.

474 XQ140. How did you know how fast to turn the handle of the taking machine the night of the swinging lamp experiment?

A. A piece of blank film was run through several times and the speed of turning the handle was judged in these preliminary tests, but in the tests made with the incandescent lamp the machine was turned by hand. The pictures taken of the Griffo-Barnet fight were run differently; to the best of my recollection, a small motor was attached to the camera and storage batteries used to drive same.

Adjourned to Wednesday, April 12, 1911, 11 a. m.

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New York, April 12, 1911, 11 a. m.

Met pursuant to adjournment.

Present—Counsel as before.

Cross-examination of MR. DICKSON continued:

XQ141. What was the kinetoscope projector, such as you referred to in XQ137?

476 A. Briefly to describe the kinetoscope projector, in question 137, there was little or no difference between the Edison kinetoscope and what they were using, hence the name, with the exception that the film was considerably wider, the slot in the shutter enlarged as much as possible, so as to retain some degree of sharpness while the film ran continuously from one large spool above the gate to the lower reel. This was the projector which I had an opportunity of running or testing in their Broadway exhibiting place.

XQ142. Was it a peep-hole machine?

A. No.

477 XQ143. That wasn't the same machine that was known as the ediscope, was it?

A. Yes.

XQ144. Did this machine project pictures on a screen?

A. Yes.

XQ145. How large were the pictures?

A. I should judge, to the best of my recollection, the pictures were projected 9 feet by 5, or a little less.

XQ146. Was any use ever made of the swinging light film?

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A. None that I know of, unless it was kept as a record.

XQ147. I asked you in a previous question how frequently after April 2nd, 1895, you were at the Lathams' shop, and you said, "Whenever I thought fit to go." Please give me a little more tangible answer.

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A. Being more or less undecided as to what I intended to do, and wishing to probe into the possibilities as described to me in such glowing colors, I went as often as I could, to be exact, which, I believe, is what you wish to know; might say, to the best of my recollection once or twice a week, and sometimes daily at their exhibit on Broadway.

XQ148. Prior to April 2nd, 1895, and all during the time that you were visiting the Lathams' shop and also visiting Lathams at the Hotel Bartholdi, where were you living?

A. As stated in my preamble, you will find I mentioned 100 Cleveland Street, Orange, New Jersey.

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XQ149. And it is your testimony that none of the visits prior to the night of the swinging light episode were made as matters of business, but purely for social purposes?

A. No. In my preamble I clearly stated that it was principally social, but with the object of trying to judge the best thing to do, to join them or not, in the exhibition business.

XQ150. When was it that the subject of photography as a matter of discussion between Latham and yourself was no longer rigidly tabooed?

A. The leading questions naturally placed by Mr. Latham tended always in the direction of

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moving photography, the matter nearest his heart, which to me being dangerous ground, by mutual consent was tabooed as much as possible. The general principles relating to light waves, general photography, as known to all and being common property, were discussed, of course, at length; but, as stated before, neither by word or action was anything disclosed or discussed in relation to the work I had in hand for Mr. Edison, nor did I wish to know anything as to the minutiae or detailed construction of what they were doing. It was better so, until I had settled the momentous question of joining them or not.

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XQ151. But my question asked *when* the subject of photography as a matter of discussion between you was no longer "rigidly tabooed"?

A. The one exception to this rule I touched on some time back when we discussed a curious movement that I had noticed in an old clock which Mr. Latham jumped at and tried. This, however, as stated before, might be put down as a slip. The movement, of course, as stated at the time, would be very slow.

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XQ152. Question repeated.

A. I presume you mean when did I feel free to discuss fully moving photography as known in the art, with the exception always, of course, of what was kept sacredly to myself, namely: the work I had been engaged in for Mr. Edison, and would say that this occurred naturally immediately after the 2nd of April, 1896.

XQ153. You have spoken of the differences between the film, of the Latham kinetoscope projector and the Edison kinetoscope. Wasn't there an additional difference, namely: that the film of

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the Latham device was transparent and that of the Edison kinetoscope opaque?

A. No; that could hardly be so, as a negative is never projected in both the Edison kinetoscope and the so-called Latham projecting kinetoscope positives or positive transparencies were used.

XQ154. In the Edison kinetoscope the observer looked directly upon the positive with a light on the other side of the positive, and the film was sufficiently opaque to prevent the light blinding or confusing the eye of the observer. Is that correct?

485

A. Not exactly. In the kinetoscope Viewing Machine a small 4 or 5 candle power lamp was used, behind which a parabolic mirror was placed, the rays crossing at a point through a narrow slot in shutter, above which an endless band of positive pictures ran continuously. These pictures were enlarged $2\frac{1}{2}$ diameters by a magnifying glass and the result appearing in a similar manner as an ordinary transparency held up to the light. In the Latham projecting kinetoscope a more powerful light was used in the form of an arc lamp of nearly 3,000 candle power, and concentrated through a short focus condenser on to the picture or transparent positive film, thence through a projecting lens to the screen.

486

XQ155. Then it is your testimony that the Edison kinetoscope employed a substantially perfectly transparent film?

A. Yes.

XQ156. All through its commercial history?

A. Yes.

XQ157. What was the construction of the "curious stopping device for actuating a clock-

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work" which you described to Latham, and which he thought would be useful for the work on which he was then engaged?

A. It might be briefly described as a U-shaped pair of plungers, the ends cut off at right angles coming to a point. These plungers coming against a peg, pushed the peg downwards by a sliding action due to the angle of the plunger. One arm of the U-shaped plunger passing beyond the peg or series of pegs placed at equal distances locked the pegs in position, the second arm of the U-shaped plunger engaging the next peg as the other was released. I think, perhaps a rough sketch may be of some assistance, as I find it rather difficult to describe from memory. The fact is, this movement is too well known and can be found, I think, in any text book on clock mechanism.

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XQ158. When you described this mechanism to Latham, were you describing a mechanism which was in principle that of one of the feeding mechanisms that had been tried for cameras in Edison's laboratory?

A. No, decidedly not.

XQ159. None of the Edison cameras that had been tried had employed a feeding mechanism in which a reciprocating member having a surface inclined to the direction of its reciprocation had caused intermittent movement of the film by engaging something connected with the film by the inclined surface?

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Mr. Page: Objected to as irrelevant and immaterial, and as an inquiry into matters in no way pertinent to the issues of the present case.

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A. None whatever; in fact, it was entirely unfitted for any other purpose but for what it was intended, namely: the slow clock-escapement movement.

XQ160. At the time that you described this device to Latham you knew that he had in mind the making of cameras or projectors with intermittent moving films, did you not?

A. Yes; he so intimated he was going to or was, I forget which.

491 XQ161. Where were you when this interview took place?

A. To the best of my knowledge at the Hotel Bartholdi.

XQ162. At that time you were familiar with the work thus far done at Edison's laboratory, with cameras having an intermittently moved film, were you not?

Objected to as irrelevant and immaterial.

A. Yes.

492 XQ163. And by that time had such cameras been used for the commercial work of taking pictures for the Edison kinetoscope?

Same objection.

A. Yes.

XQ164. What was the construction of the feeding mechanism in the camera used in this commercial work?

Same objection.

A. Briefly, a horizontal continuously traveling disk containing one slot adjacent to a vertical

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three-toothed disk, one of the teeth resting on the first mentioned horizontal rotating disk slipped through said mentioned slot, giving an impulse to further mechanism controlling the film on a sprocket wheel. The three-toothed vertical disk was kept in tension in a forward direction while resting one of the teeth on the first mentioned horizontal slotted disk.

XQ165. Did the intermittently acting mechanism pull directly upon the film on the supply reel without any intermediate devices engaging the film?

494

A. Yes.

XQ166. This feeding mechanism that you have described was the only one used in cameras for taking pictures for the Edison kinetoscope prior to your leaving Edison, was it?

A. Yes.

XQ167. Do you recall making some experiments with Otway Latham at Columbia College?

A. Yes.

XQ168. Those experiments were made, well, before the end of 1894, were they not?

495

A. Yes.

XQ169. What were those experiments?

A. As stated before, the experiment I wished to try was to see if with a powerful arc lamp the kinetoscope could be used for projecting or not, and if so, then I could approach Mr. Edison for the rights of exhibition by projection in accordance with my agreement letter with Mr. Woodville Latham to the effect that I would use my best endeavors to persuade Mr. Edison to give us the right of using his film. We found the experiment, which was made openly, at Columbia College, (that being my preference) to be sufficiently encour-

aging for me to keep my agreement. The experiment simply consisted in running an old transparent film through an Edison kinoscope in the form of a short endless band, the shutter hole being slightly enlarged so that we could get more light through. The picture projected was about 2 feet square. This was done in the presence of some of the Columbia College professors; Mr. Woodville Latham or Mr. Otway Latham, I forget which was present.

497 XQ170. Do you recall making a sketch or sketches of the stop mechanism or intermittent feeding mechanism for the Lathams?

A. No, I have no recollection and in fact, I can certify most positively that no such sketches were ever made by me at any time prior to my leaving Mr. Edison, unless perhaps I sketched out the clock stop motion already discussed.

XQ171. Can you say positively whether you did or did not sketch out such mechanism and leave the sketch with one of the Lathams or Mr. Lauste?

A. To the best of my recollection, I think it is quite likely that I did, as Mr. Woodville Latham was very anxious to try this device.

498 XQ172. You did know at the time, then, that Mr. Latham wanted to try this stop mechanism you suggested, in connection with his development of moving picture machines?

A. Yes, for he stated as much, that he wished to try it.

XQ173. Had Mr. Latham, prior to the first of November, 1894, repeatedly shown you drawings of a machine for projecting pictures, having intermittent movement of the film?

A. No.

XQ174. Had he shown you any such drawings at any time in 1894?

A. To the best of my recollection, he stated that he had many sketches and devices but I positively refused to inspect same for obvious reasons.

XQ175. Was the Columbia College experiment one that lasted more than a single day?

A. It lasted for an hour or an hour and a half, possibly two hours, as we could not take up the time of the professors and attendants. It was only on one day.

XQ176. Do you know of any experiments made by Woodville Latham in October or September, 1894, in which part of the apparatus employed was furnished by you from the Laboratory of Mr. Edison?

A. None whatever, with the exception of the Columbia College test which I made.

RECESS.

XQ177. Mr. Lauste came to this country to give his testimony in this case at the same time that you did, did he not?

A. Yes.

XQ178. Was it you who arranged with him over there about coming?

A. No.

XQ179. When did you last see him on the other side?

A. At his house a week before leaving.

XQ180. And when last before that?

A. About a year and a half before.

XQ181. You came over on the same steamer?

A. Yes.

XQ182. You both knew that you were coming over to give testimony with reference to the work in Latham's shop?

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A. Yes.

XQ183. And am I to understand that the arrangements for Lauste coming over here had all been made entirely independently of you?

A. Yes.

XQ184. You do not fix the date of February 26, 1896, except by what you have read in a printed copy of Latham's previous testimony, do you?

A. No.

XQ185. Did you ever write a letter to Lauste asking him whether he remembered that you were the one who had suggested the loop in the film of the Latham camera?

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A. No, I have no such recollection.

XQ186. Can you say positively that you never wrote such a letter to him?

A. I can.

XQ187. Or any other, asking him whether he remembered your invention of any part of the Latham camera—or something to that general effect?

A. I have no recollection whatever of writing any letter on this subject.

XQ188. In Compliment's Exhibit, Lauste Deposition, I find the following: "XQ126. Well, did Mr. Dickson speak to you about it? A. No; he wrote to me some time ago, and asked me if I remembered that he is the inventor of the loop, and I said no, because I made the machine before he came." Can you say positively that there is no basis for this statement?

504

A. None whatever, I have no recollection of writing any such letter. I remember calling him up on the 'phone prior to going to his house and telling him that there was a case coming on which I learned from Mr. Koopman, also over 'phone,

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that we might have to go out to America to testify as to the Latham inventions, and there was a question of a loop to be testified on.

XQ189. That was just shortly before you started to this country, the end of last month?

A. Yes.

XQ190. Had Lauste already heard of it, did he say?

A. Yes.

XQ191. In your conversations with Lauste, beginning on that day over the telephone, and up to the time that he gave his testimony, what was said between you as to who had suggested the loop?

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A. Mr. Lauste, in his cabin on board the "Bat- tie" talked on various things in connection with his old work and also touched on the loop, knowing as he did that that feature of the work seemed to be of importance and explained how he had first thought of it by seeing a loop in a certain book at some time or other, catalogue, I believe he said, of machinery, and that when they were experimenting Mr. Latham was very desirous of preventing the film from tearing and so this loop was added and a general talk of this kind. I wasn't particularly interested in all this. It was my part of the programme to remember what I did, what I saw and so on.

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XQ192. The testimony or the extract from testimony given by Lauste, which I read to you, was given in 1898, 13 years ago. Having this in mind, does it aid to refresh your recollection and modify it in any way after your having written such a letter?

A. No, I can only state what I remember and what I see and say to the best of my knowledge

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that I have no recollection whatever of writing such a letter.

XQ193. Was the feature of a loop between the exposure window and the supply roll a new one to you when you saw it at the swinging light episode?

A. Yes.

XQ194. Is it true that you told Mr. Lauste before Lauste had met Latham that you had a good situation for him in connection with a machine for projecting pictures and did you then give him a letter of introduction to Mr. Latham?

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A. Part right, part wrong. I gave Mr. Lauste a letter of introduction to Mr. Woodville Latham, not knowing or having the slightest clue that Mr. Latham was going into competition which on the face of it would have been to jeopardize my own interests. It was after I had given this introduction that Mr. Woodville Latham, in an interview, said that he had some good ideas in moving photography which he wished carried out. No mention was made in my letter of introduction as plainy he seen, in regard to what class of work Mr. Latham wanted Mr. Lauste to do.

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XQ195. At the time you gave the letter to Lauste, did you know that the younger Lathams were engaged in business in connection with the employment of Edison kinetoscopes?

A. I knew the young Lathams had six or more machines on exhibition somewhere in New York and if I remember correctly, I simply inferred that they wished a good mechanic to look after and keep their machines in running order.

XQ196. Do you recall anything as to what the book was that you were using in the Edison Lab-

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oratory and that Lauste referred to as being one that contained a showing of this loop?

A. I am afraid I cannot help you as I do not remember the book.

XQ197. Do you recall whether Lauste ever came to you while you were still with Edison to get what ideas you had for these moving picture machines?

A. I do.

XQ198. State the circumstances, please.

A. Mr. Lauste came over from New York unsolicited by me and told me he was instructed by Mr. Woodville Latham to see if I would help them in regard to some difficulty or something or other, presumably a stop motion of some kind. I remember distinctly and wish it quite clearly understood that in keeping with all I did at the time, I pointed out to Mr. Lauste that I could give him no assistance whatever in the art until I had made up my mind to join forces with them.

XQ199. Do you remember whether before the time of the swinging light pictures you many times told Lauste that you didn't like coming to the shop because it was compromising to you and that when you would leave Edison it would be all right, that you would come every day but until then you could not do it?

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A. Quite right. I remember every word of it.

XQ200. How long was that before the day when you told Mr. Edison that he would have to choose between Gilmore and yourself and upon his refusing to discharge Gilmore, the handing in of your resignation?

A. I haven't the remotest idea. What I said to Lauste did occur as stated, but when it occurred, I do not remember.

XQ201. Did the film pass upward or downward

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in the machine that took the swinging light photographs?

A. Downward.

XQ202. Did you know E. W. Kleiwer?

A. Yes, I saw a man by that name at the Latham shop.

XQ203. Do you know anything about what has become of him?

A. No.

XQ204. Did you take a picture or help to take a picture with the same camera on the roof of the Scott building after the swinging light episode and before the picture of the Griffo-Barnet fight?

A. No.

XQ205. Do you recollect a conference in New York between Otway Latham, yourself, your wife, Mr. Edmond Congar Brown and Mr. John Murray Mitchell?

A. I do.

XQ206. State the time when this conference occurred and also state what occurred at the conference.

A. I have no recollection of the date of conference but I remember it was in regard to the same old thing, to join or not to join and also in relation to, that if I would join them, I should have a certain amount of stock allotted to me. I think that was the purpose of the conference in question, but as for the stock, this stock was never transferred to me nor have I to this day seen a share certificate and it was only the other day that Mr. Lauste handed me for my inspection a share certificate under the heading of the Lamda Company.

XQ207. Wasn't it at this conference that it was agreed among all of you that a quarter of the stock of the Lamda Company be assigned to Mr.

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Brown because you did not wish to make a contract in your name and so place yourself that the propriety of your actions might be questioned?

A. No. The stock at Mr. Edmond Congar Brown's suggestion, should be put in his name, for the sole reason that he wished to safeguard my interests in case I should join them, the business proving satisfactory. I know very little more about this, but I have no doubt Mr. Edmond Congar Brown could give you all the information you require.

XQ208. You gave Mr. Brown a power of attorney to act for you in these matters, did you not?

A. I do not remember giving Mr. Brown a power of attorney. Mr. Brown was my legal adviser in many other matters and did this, if I remember right, as a friend.

XQ209. What was the object of having legal advisers for both sides present at this conference, if its only purpose was to discuss the advisability of your making a connection with Latham?

A. I give it up, presumably, however, to come to some definite understanding that if I did leave, I should be provided for.

XQ210. I understand that before the supplementary roller on the upper sprocket wheel which you suggested was added, the film came straight down. Is this supplementary roller shown on the sketch Lauste made in this case?

A. Yes.

XQ211. It is the uppermost roller of the sketch, is it?

A. Yes.

XQ212. And before this, the film was only engaged by one tooth on the upper sprocket, is that right?

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A. One or two teeth.

XQ213. And that put too much strain on these perforations and frequently resulted in tearing the films?

621 A. I remember running through a long piece of negative film, a few days prior to the Griffo-Bar-net light and it seemed to run very satisfactorily until there would be a little slack. When this was taken up a slight jerk would take place and on examination, I noticed a roughness in one or two of the perforations. This, however, did not depreciate in any way that I could see, the results. I, however, thought it advisable when trying this experiment over again, while placing my thumb further along towards the upper center of the sprocket wheel to place at this particular point a roller of rubber or some other soft material, I do not just remember which, grooved out on the sides to allow the sprocket teeth to enter. The result of this roller was simply to add a few more teeth as an additional precaution against any possible danger of roughness on the edge of the film perforation. I don't know if this was absolutely essential but it had its use.

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XQ214. What do you know as to Latham's financial condition during the period about which you have testified?

A. I am afraid very little. I believe he found someone to join him in financing his work. This was a matter I had nothing to do with.

XQ215. The discussions between you relative to your joining the Lathams, did not bring out any expectations on Latham's part that you would financially contribute to the enterprise, did they?

A. No.

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XQ216. Did you and Latham ever discuss patenting the camera which you saw?

A. No, not to my recollection.

XQ217. Is there any other error that you can perceive in Lanste's sketch as a correct showing of the mechanism of the camera as it existed when it took the swinging light pictures, except the presence of the additional roller that you had suggested and the different path of the film produced thereby?

A. The sketch handed me looks all right. The only thing I do not remember about it is just how the upper or No. 1 and No. 4 continuous running sprockets were joined together. I know, however, that these two sprockets ran together and No. 2 and No. 3 sprockets were also joined, presumably as shown. I think on the whole that the sketch is quite what I saw at that time.

XQ218. What do the letters K. M. C. D. in the name of your syndicate indicate?

A. The letters K. M. C. D. indicate E. B. Koopman, H. N. Marvin, Hermann Casler and W. K. L. Dickson.

XQ219. At the time of the testimony in Latham vs. Casler vs. Arant, were you familiar with the fact that there was an interference pending and in a general way, the character of the invention involved therein?

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A. I was aware that this case was going on in America but knew little or nothing what it was all about.

XQ220. What was the untenable proposition which Mr. Woodville Latham and his sons made to you in the presence of your wife at your house in Orange?

A. That I should that day leave Mr. Edison and

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work with them in developing a talking machine on the lines of the Edison so-called kinetograph, not that I really think that Mr. Woodville Latham, to do him justice, wished me to divulge anything I had been doing for Mr. Edison but wished to have an apparatus under their control that they could make films for exhibition purposes. It was modified, of course, to what I have already stated, and in fact, it was the only thing to be done, namely, to get Mr. Edison to supply these films for this particular exhibition purposes.

527 XQ221. Please state all that you can remember that was contained in the letter which you received, and as a result of which you visited the shop and photographed the swinging light?

A. I cannot bind myself to the exact wording but the sense of the letter was to the effect that I should come at once, as they believed they had something fine and I must see it. It was a jubilant epistle and so I went.

XQ222. Didn't the letter mention that it was a camera they wanted to show you?

528 A. I do not think so. I do not think there was any description. I naturally knew or inferred that it was the camera; as stated before I was aware that they were working on such a device, although I had never seen it in detail. In fact, I purposely kept away at one of the visits from looking at the construction. Upon that evening, however, the whole thing was explained and shown me.

XQ223. Didn't you go over expecting to be shown a camera?

A. Naturally. The purport of the letter indicated that they wished to show me something fine or good, whatever the words were.

Adjourned to Friday, April 14, 1911, 10.30 A. M.

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New York, April 14, 1911,
10.30 A. M.

Met pursuant to adjournment.
Present: Counsel as before.

Cross-examination of MR. DICKSON continued:

XQ224. Did you ask the Lathams or any of them to choose the location for a shop as near as practicable to the ferry connecting with the trains for Orange or something to that effect?

530 A. No, decidedly not. This was proposed to me by Mr. Woodville Latham as being more convenient for me to come over and see their work and help them. This, of course, is another of those garbled and vindictive statements made in the testimony of that gentleman and which I am here to confute whenever I can.

XQ225. Before the night of the swinging light, did you see any efforts made to project pictures with a machine of the same general character as the machine used to take the pictures of the swinging light or with that same machine at the Frankfort Street shop?

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A. No.

XQ226. Did you supply any film for that purpose or for any purpose in January or February 1895, to the Lathams or anyone connected with them?

A. No, decidedly not.

XQ227. Did you find Otway Latham and Orny Latham or either of them skilled as mechanics?

A. No, but Mr. Otway appeared to be very handy.

XQ228. When you visited the Latham shop be-

fore the night of the swinging light pictures, was it quite a frequent occurrence that Mr. Woodville Latham would not be there?

A. As I went purely and alone on Mr. Woodville Latham's invitation, with possibly occasional invitations from Otway Latham, I would find the inviters always there, except on the night of the lamp test when Mr. Woodville Latham was ill, or indisposed.

QX229. At the time of these various visits, do you know whether Mr. Otway Latham knew you were working with Mr. Edison upon photographic machines?

A. Decidedly, since he and his people bought kinesiographs which they had on exhibition somewhere in the city.

QX230. On April 2nd, 1895, did you consider Latham obligated to you in any way?

A. No, not in any way.

QX231. How about any earlier period than that?

A. The same answer applies as naturally I could not charge them for erecting the Edison kinesiographs at their exhibit as I was paid to do this by Edison.

QX232. Did you meet Gray Latham and Otway Latham or either of them at any time at the Laboratory of Mr. Edison?

A. Yes, in the early part of 1894, they came to Mr. Edison's Laboratory to purchase some kinesiographs for exhibition purposes. It was then that I met them for the first time and possibly three times after that during this deal.

QX233. Did you ever tell either Gray Latham or Otway Latham at Edison's Laboratory that you

were the real inventor of the kinesiograph, having suggested the idea to Edison?

A. To the best of my recollection, I hardly think even if I had been the inventor, so-called, would it have been policy to have made such a statement to utter strangers. I am confident, however, that this is another spiteful dab.

QX234. Are you positive in your recollection that there is no basis whatever for any such statement as this?

A. I can state emphatically that I have not the slightest recollection of any such conversation.

QX235. Can you swear positively that you did not make any statement of this character to either of the Lathams at the Edison Laboratory?

Mr. Page: Objected to as irrelevant and immaterial, as, if the witness is testifying to the best of his recollection, it is quite immaterial how he answers this question.

A. As stated before, I have no recollection of making such a statement, and I am inclined to believe, to the best of my knowledge, the conversation did not take place or was turned and related for a purpose.

QX236. You do recollect, however, do you not, that at the Edison Laboratory, you did express to one of the Lathams your displeasure at not having received the credit due you for the work in moving picture lines you had done with Edison?

A. This question is in keeping with the last and tends to show that there was some hidden object in making these various statements. I again, will most emphatically state that I have no recollection of such conversations especially with men that I knew nothing about.

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XQ237. Do you remember whether or not in your conversation with Gray or Otway Latham at the Edison Laboratory you suggested or intimated that an association with them in the kinetoscope business would be more pleasing to you than association with Edison?

A. I think on the face of it, this would be utterly absurd, considering the number of years I had been so delightfully associated with Mr. Edison and that my work was so highly congenial to me in every respect. I was head of the electrical mining department as well as the head of the kinetographic and kinetographic moving picture department and this should be answer enough to show the ridiculous and I again use the word, vindictive nature of the series of statements.

XQ238. Do you remember that Otway Latham and Grey Latham asked you if you would be willing to join with them in their work and that after some hesitation you agreed that you would talk the matter over with your wife and give a definite answer at a later time?

A. Quite right. This, however, has been explained in previous answers and questions.

XQ239. Did you see any 1894 or 1895 drawings made by Lausato for cameras or projecting machines or parts thereof?

A. I saw several sketches lying around on table and bench, but was particularly careful not to inspect same, for obvious reasons.

XQ240. The reasons may be "obvious," but in all this deposition, I have been unable to find anything that explains why your reasons for not examining these drawings and apparatus in process of construction did not equally apply to prevent you when you received a letter from Otway Latham

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from which you understood that a moving picture camera had been completed, ready for your inspection, from visiting the shop and obtaining the exact information as to that camera. Do you desire to explain any further?

Counsel for complainant suggests that this may be due to a lack of perception on the part of Defendant's Counsel and not such an inference as others might draw from the testimony and therefore objects to all but the interrogative portion of the question as irrelevant and immaterial.

A. The matter is as simple as A B C, and I have endeavored throughout this testimony to various answers and questions to show that I was particularly careful as long as I was not associated with the Lathams, as a matter of honor, to probe and unduly examine into their work. The same thing applied to the fact that I was scrupulously careful not to divulge anything that was going on at Mr. Edison's laboratory and it was not until I was invited to see the completed camera on the night of the swinging lamp test that I commenced to see the possibility of joining the Lathams which even then was most uncertain. Although this machine was thoroughly explained and examined by me, I felt that even if I did not join I could, of course, not take any advantage of what I had seen. In conclusion, would add, as stated before, that this was forced on me.

XQ241. In your answer to XQ164 you described the feeding mechanism of the camera used in the commercial work for producing pictures for the Edison kinetoscope. Was the horizontal continu-

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ous travelling disc you speak of arranged like the disc 25 of the Edison Patent 12,037, except that it had one slot instead of six and was the vertical three toothed disc arranged like the disc 22 of that patent with relation thereto except that it had three teeth instead of six?

Mr. Page: Objected to as irrelevant and immaterial and as fishing for information, no way pertinent to the questions involved in this case.

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A. My explanation or description as given in my answer 164 is purely from memory, some 22 years ago, was broadly a description of the action of such a machine. What I described doubtless was sufficiently correct for the purpose and perhaps one of the modifications we made at that time. The patent drawing entitled "T. A. Edison Kinetoscope No. 12,037" shows such a modification and looks quite correct; showing more teeth on the vertical disc with a corresponding additional number of slots, in the travelling horizontal disc. The terms horizontal and vertical do not as closely apply to this drawing as in my rough description from memory, although the action is the same.

QX242. How long a film was used in the Edison kinetoscope?

A. In the first models, there was about between 25 and 30 feet and later 48 feet.

QX243. 48 feet was the longest length of film used on the commercial kinetoscope?

A. Yes.

QX244. And was the same length or a lesser length used on the camera when taking pictures for the kinetoscope?

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Mr. Page: The objection heretofore made to Counsel for Defendant using this case as a fishing excursion for information in no way necessary or relevant to the issues is objected to as a gross abuse of the privileges of cross-examination.

A. It depended somewhat on the subject and on some occasions two 24 foot lengths were used on several subjects and sometimes three subjects photographed and joined together to make up the required length averaging about 48 feet on the last models, or when the occasion required, a complete 48 length was used in the taking camera developed, printed, and the positive placed in the kinetoscope in the form of an endless band.

QX245. How did the thickness of the film used in the kinetoscope compare with the thickness of the film used in kinetoscope projectors,—if you can, state the thickness of each.

Mr. Page: Same objection.

A. I am afraid this is rather too much of a task. My distinct remembrance, however, is that the film used in the camera was extremely thin, almost like paper but very tough. The positive, if I remember well, was somewhat thicker as used in the Edison kinetoscope. I had the pleasure of handling in a sample of the Griffo-Barnet positive film used by the Lathams in their projecting machine and I think that both the slow emulsion positive films used in the Edison kinetoscope and in the so-called Latham kinetoscope projector, were very much alike as to thickness.

QX246. And as I understand you, the film used

in the camera was much thinner, that is, the Edison camera. Is that right?

A. Somewhat thinner, yes.

QX247. Two thousandths of an inch thick or thinner?

A. I give it up, too difficult to remember such exact measurements after so many years. For that reason I made my answer comparative.

QX248. How did the color of the film used in the Latham camera compare with that of Edison camera?

651 A. In your question, I presume you mean the unexposed film. Nearly all film used from that time to the present has a creamy delicately tinted greenish appearance.

QX249. Has all the unexposed film from the beginning been of that color, do you know?

A. Yes.

Cross-examination Closed.

Re-direct Examination by Mr. Page:

RDQ250. Have you any pecuniary interest in the outcome of this suit?

A. None whatever.

Re-cross Examination by Mr. Byrne:

RXQ251. Do you hold stock in the K. M. C. D. Syndicate?

A. I do not think it can be called holding stock. I have an interest or had an interest in this K. M. C. D. Syndicate, but having disposed of my holdings in all the subsidiary companies, including the American Biograph & Mutoscope Company, my interest therefore in the K. M. C. D. would naturally come to an end.

RXQ252. Is the K. M. C. D. Syndicate an incorporated company?

A. No, it is still an agreement of partnership.

RXQ253. Do you mean that your present interest in the K. M. C. D. Syndicate is one of no value whatever?

A. Yes, unfortunately.

RXQ254. The K. M. C. D. Syndicate owns nothing of any kind, is that it?

A. For many years past, I have received nothing from the K. M. C. D. and with the exception of the K. M. C. D. Syndicate holding one or two side 654 lines, which in fact do not know exactly what they are, anyway, nothing seems to have come of the side lines, I later, as stated before, sold out my shares in any company or companies which should have paid interest in a certain proportion to this quarter partnership, hence my explanation that if I held no shares, there could be no division of interest as far as I was concerned.

RXQ255. How recently did you sell out?

A. About three years ago or maybe more, I sold out my last holding, namely, the American Mutoscope & Biograph Company shares.

RXQ256. What arrangements were made with you as to coming over here to give this testimony?

A. A fee of \$300, out of which I should pay my own expenses.

Deposition Closed.

W. K. L. DICKSON.

**Legal Department Records
Motion Pictures - Case Files**

***Motion Picture Patents Company v.
Universal Film Manufacturing Company et al.***

Jesse Isidor Straus et al. v. Victor Talking Machine Company

This folder contains two U.S. Supreme Court opinions of April 9, 1917. The first pertains to the suit brought by the Motion Picture Patents Co. against the Universal Film Manufacturing Co. and other defendants for infringement of Woodville Latham's U.S. Patent 707,934. The second relates to the suit brought by Jesse Isidor Straus and other plaintiffs against the Victor Talking Machine Co. Both opinions became legal precedents, barring the license agreements used by the Motion Picture Patents Co. and Thomas A. Edison, Inc., to fix prices and otherwise limit the use or sale of their products. Both opinions contain marginal notations, some probably by Edison.

SUPREME COURT OF THE UNITED STATES.

No. 715.—OCTOBER TERM, 1916.

Motion Picture Patents Company,
Petitioner,
vs.
Universal Film Manufacturing
Company, et al.

Certiorari to the United States
Circuit Court of Appeals for
the Second Circuit.

[April 9, 1917.]

Mr. Justice CLARKE delivered the opinion of the Court.

In this suit relief is sought against three defendant corporations as joint infringers of claim number seven of United States letters patent No. 707,934 granted to Woodville Latham, assignor, on August 26, 1902, for improvements in Projecting-Kinetoscopes. It is sufficient description of the patent to say that it covers a part of the mechanism used in motion picture exhibiting machines for feeding a film through the machine with a regular, uniform and accurate movement and so as not to expose the film to excessive strain or wear.

The defendants in a joint answer do not dispute the title of the plaintiff to the patent but they deny the validity of it, deny infringement, and claim an implied license to use the patented machine.

Evidence which is undisputed shows that the plaintiff on June 20, 1912, in a paper styled "License Agreement" granted to The Precision Machine Company a right and license to manufacture and sell machines embodying the inventions described and claimed in the patent in suit, and in other patents, throughout the United States, its territories and possessions. This agreement contains a covenant on the part of the grantor that every machine sold by it, except those for export, shall be sold "under the restriction and condition that such exhibiting or projecting machine shall be used solely for exhibiting or projecting motion pictures containing the inventions of reissued letters patent No. 12,192, issued by a Licensee

of the licensor while it owns said patents and upon other terms to be fixed by the licensor and complied with by the user while the said machine is in use and while the licensor owns said patents (which other terms shall only be the payment of a royalty or rental to the licensor while in use)."

The grantee further covenants and agrees that to each machine sold by it, except for export, it will attach a plate showing plainly not only the dates of the letters patent under which the machine is "licensed," but also the following words and figures:

"Patented _____ No. _____
"The sale and purchase of this machine gives only the right to use it solely with moving pictures containing the invention of re-issued patent No. 12192, issued by a licensee of the Motion Picture Patents Company, the owner of the above patents and reissued patent, while it owns said patents, and upon other terms to be fixed by the Motion Picture Patents Company and complied with by the user while it is in use and while the Motion Picture Patents Company owns said patents. The removal or defacement of this plate terminates the right to use this machine."

The agreement further provides that the grantee shall not sell any machine at less than the plaintiff's list price, except to jobbers and others for purposes of resale and that it will require such jobbers and others to sell at not less than plaintiff's list price. The price fixed in the license contract for sale of machines after May 31, 1909, is not less than \$150 for each machine and the licensee agrees to pay a royalty of \$6 on some machines and a percentage of the selling price on others.

It is admitted that the machine, the use of which is charged to be an infringement of the patent in suit, was manufactured by The Precision Machine Company and was sold and delivered under its "License Agreement" to the Seventy-second Street Amusement Company, then operating a playhouse on Seventy-second Street, in New York, and that when sold it was fully paid for and had attached to it a plate with the inscription which we have quoted as required by the agreement.

Reissued patent 12,192, referred to in the notice attached to the machine, expired on August 31, 1914. The defendant Prague Amusement Company on November 2, 1914, leased the Seventy-second Street playhouse from the Seventy-second Street Amusement Company, and acquired the alleged infringing machine as a part

of the equipment of the leased playhouse. Subsequent to the expiration of reissued patent 12,192 the defendant, Universal Film Manufacturing Company made two films or reels, which, between March 4th and 17th, 1915, were sold to the defendant the Universal Film Exchange and on March 17, 1915, were supplied to the defendant Prague Amusement Company for use on the machine, acquired as we have stated, and were used upon it at the Seventy-second Street playhouse on March 18th, 1915.

On January 18, 1915, the plaintiff sent a letter to the Seventy-second Street Amusement Company, notifying it in general terms that it was using without a license a machine embodying the invention of patent No. 707,934 and warning it that such use constituted an infringement of the patent, and on the same day the plaintiff addressed a letter to the defendant Universal Film Exchange notifying it that it also was infringing the same patents by supplying films for use upon the machine of the Seventy-second Street playhouse and elsewhere. The bill in this case was filed on March 18, 1915.

The District Court held that the limitation on the use of the machine attempted to be made by the notice attached to it, after it had been sold and paid for, was invalid, and that the Seventy-second Street Amusement Company, the purchaser, and its lessee, the Prague Amusement Company, had an implied license to use the machine as it had been used, and it dismissed the bill without passing on the question raised in the pleadings as to the validity of the patent. The Circuit Court of Appeals affirmed the District Court (298 Fed. 398) and the case is here for review on certiorari.

It was admitted at the bar that 40,000 of the plaintiff's machines are now in use in this country and that the mechanism covered by the patent in suit is the only one with which motion picture films can be used successfully.

This state of facts presents two questions for decision:

First: May a patentee or his assignee license another to manufacture and sell a patented machine and by a mere notice attached to it limit its use by the purchaser or by the purchaser's lessee, to films which are no part of the patented machine, and which are not patented?

Second: May the assignee of a patent, which has licensed another to make and sell the machine covered by it, by a mere notice attached to such machine, limit the use of it by the purchaser or by

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the purchaser's lessee to terms not stated in the notice but which are to be fixed, after sale, by such assignee in its discretion?

It is obvious that in this case we have presented anew the inquiry, which is arising with increasing frequency in recent years, as to the extent to which a patentee or his assignee is authorized by our patent laws to prescribe by notice attached to a patented machine the conditions of its use and the supplies which must be used in the operation of it, under pain of infringement of the patent.

The statutes relating to patents do not provide for any such notice and it can derive no aid from them. R. S. 4900, requiring that patented articles shall be marked with the word "Patented" affects only the damages recoverable for infringement, *Dunlap v. Schofield*, 162 U. S. 244, and R. S. 4901, protects by its penalties the inventor, but neither one contemplates the use of such a "License Notice" as we have here and whatever validity it has must be derived from the general and not from the patent law.

The extent to which the use of the patented machine may validly be restricted to specific supplies or otherwise by special contract between the owner of a patent and the purchaser or licensee is a question outside the patent law and with it we are not here concerned. *Keller v. Standard Folding Bed Co.*, 167 U. S. 659.

The inquiry presented by this record, as we have stated it, is important and fundamental, and it requires that we shall determine the meaning of Congress when in R. S. 4884 it provided that "Every patent shall contain . . . a grant to the patentee, his heirs, or assigns, for the term of seventeen years of the exclusive right to make, use and vend the invention or discovery throughout the United States and the territories thereof." We are concerned only with the right to "use," authorized to be granted by this statute, for it is under warrant of this right only that the plaintiff can and does claim validity for its warning notice.

The words used in the statute are few, simple and familiar, they have not been changed substantially since they were first used in the act of 1790 (1 Stat. at Large, ch. 7, p. 109), *Bauer v. O'Donnell*, 229 U. S. 1, 9, and their meaning would seem not to be doubtful if we can avoid reading into them that which they really do not contain.

In interpreting this language of the statute it will be of service to keep in mind three rules long established by this court,

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applicable to the patent law and to the construction of patents, viz:

1st. The scope of every patent is limited to the invention described in the claims contained in it, read in the light of the specification. These so mark where the progress claimed by the patent begins and where it ends that they have been aptly likened to the description in a deed, which sets the bounds to the grant which it contains. It is to the claims of every patent, therefore, that we must turn when we are seeking to determine what the invention is, the exclusive use of which is given to the inventor by the grant provided for by the statute,—*"He can claim nothing beyond them."* *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274; *Railroad Co. v. Mott*, 104 U. S. 112, 118; *Yale Lock Mfg. Co. v. Greenleaf*, 117 U. S. 554, 559; *McClain v. Orminger*, 141 U. S. 419, 424.

2nd. It has long been settled that the patentee receives nothing from the law which he did not have before, and that the only effect of his patent is to restrain others from manufacturing, using or selling that which he has invented. The patent law simply protects him in the monopoly of that which he has invented and has described in the claims of his patent. *United States v. American Bell Telephone Co.*, 167 U. S. 224, 239; *Paper Bag Patent Case*, 210 U. S. 405, 424; *Bauer v. O'Donnell*, 229 U. S. 1, 10.

3rd. Since *Pennock v. Dialogue*, 2 Pet. 1, was decided in 1829 this court has consistently held that the primary purpose of our patent laws is not the creation of private fortunes for the owners of patents but is "to promote the progress of science and the useful arts" (Constitution, Art. I, Sec. 8), an object and purpose authoritatively expressed by Mr. Justice Story, in that decision, saying:

"While one great object (of our patent laws) was, by holding out a reasonable reward to inventors and giving them the exclusive right to their inventions for a limited period, to stimulate the efforts of genius, the main object was 'to promote the progress of science and the useful arts.'"

Thirty years later this court, returning to the subject, in *Kendall v. Winsor*, 21 How. 322, again pointedly and significantly says:

"It is undeniably true that the limited and temporary monopoly granted to inventors was never designed for their exclusive profit or advantage; the benefit to the public or community at large was another and doubtless the primary object in granting and securing that monopoly."

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This court has never modified this statement of the relative importance of the public and private interests involved in every grant of a patent, even while declaring that in the construction of patents and the patent laws, inventors shall be fairly, even liberally, treated. *Grant v. Raymond*, 6 Pet. 218, 241; *Winans v. Denmead*, 15 How. 339; *Walker on Patents*, Sec. 185.

These rules of law make it very clear that the scope of the grant which may be made to an inventor in a patent, pursuant to the statute, must be limited to the invention described in the claims of his patent (104 U. S. 118, *supra*) and to determine what grant may lawfully be so made we must hold fast to the language of the Act of Congress providing for it, which is found in two sections of the Revised Statutes. Section 4886 provides that "Any person who has invented or discovered any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement thereof, . . . may obtain a patent therefor"; and section 4884 provides that such patent when assigned "shall contain . . . a grant to the patentee, his heirs, or assigns . . . of the exclusive right to . . . use . . . the invention or discovery."

Thus the inventor may apply for, and, if he meets the required conditions, may obtain, a patent for the new and useful invention which he has discovered, which patent shall contain a grant of the right to the exclusive use of his discovery.

Plainly, this language of the statute and the established rules to which we have referred restrict the patent granted on a machine, such as we have in this case, to the mechanism described in the patent as necessary to produce the described result. It is not concerned with and has nothing to do with the materials with which or on which the machine operates. The grant is of the exclusive right to use the mechanism to produce the result with any appropriate material, and the materials with which the machine is operated are no part of the patented machine or of the combination which produces the patented result. The difference is clear and vital between the exclusive right to use the machine which the law gives to the inventor and the right to use it exclusively with prescribed materials to which such a license notice as we have here seeks to restrict it. The restrictions of the law relate to the useful and novel features of the machine which are described to the claims

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of the patent, they have nothing to do with the materials used in the operation of the machine; while the notice restrictions, have nothing to do with the invention which is patented but relate wholly to the materials to be used with it. Both in form and in substance the notice attempts a restriction upon the use of the supplies only and it cannot with any regard to propriety in the use of language be termed a restriction upon the use of the machine itself.

Whatever the right of the owner may be to control by restriction the materials to be used in operating the machine must be a right derived through the general law from the ownership of the property in the machine and it cannot be derived from or protected by the patent law, which allows a grant only of the right to an exclusive use of the new and useful discovery which has been made—this and nothing more.

This construction gives to the inventor the exclusive use of just what his inventive genius has discovered. It is all that the statute provides shall be given to him and it is all that he should receive, for it is the fair as well as the statutory measure of his reward for his contribution to the public stock of knowledge. If his discovery is an important one his reward under such a construction of the law will be large, as experience has abundantly proved, and if it be unimportant he should not be permitted by legal devices to impose an unjust charge upon the public in return for the use of it. For more than a century this plain meaning of the statute was accepted as its technical meaning, and that it afforded ample incentive to exertion by inventive genius is proved by the fact that under it the greatest inventions of our time, teeming with inventions, were made. It would serve no good purpose to amplify by argument or illustration this plain meaning of the statute. It is so plain that to argue it would obscure it.

It was not until the time came in which the full possibilities seem first to have been approached of uniting, in one, many branches of business through corporate organization and of gathering great profits in small payments, which are not realized or reaped, from many, rather than smaller or even equal profits in larger payments, which are felt and may be refused, from a few, that it came to be thought that the "right to use . . . the invention" of a patent gave to the patentee or his assigns the right to restrict the use of it to materials or supplies not described in the patent and not by its terms made a part of the thing patented.

The construction of the patent law which justifies as valid the restriction of patented machines, by notice, to use with unpatented supplies necessary in the operation of them, but which are no part of them, is believed to have originated in *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. Rep. 288, (which has come to be widely referred to as the *Button-Fastener* case), decided by the Circuit Court of Appeals of the Sixth Circuit in 1896. In this case the court, recognizing the pioneer character of the decision it was rendering, speaks of the "novel restrictions" which it is considering and says that it is called upon "to mark another boundary line around the patentee's monopoly which will *debar him from expressing the market for an article not the subject of a patent*," which it declined to do.

This decision proceeds upon the argument that, since the patentee may withhold his patent altogether from public use he must logically and necessarily be permitted to impose any conditions which he chooses upon any use which he may allow of it. The defect in this thinking springs from the substituting of inference and argument for the language of the statute and from failure to distinguish between the rights which are given to the inventor by the patent law and which he may assert against all the world through an infringement proceeding and rights which he may create for himself by private contract which, however, are subject to the rules of general as distinguished from those of the patent law. While it is true that under the statutes as they were (and now are) a patentee might withhold his patented machine from public use, yet if he consented to use it himself or through others, such use immediately fell within the terms of the statute and as we have seen he is thereby restricted to the use of the invention as it is described in the claims of his patent and not as it may be expanded by limitations as to materials and supplies necessary to the operation of it imposed by mere notice to the public.

The high standing of the court rendering this decision and the obvious possibilities for gain in the method which it approved led to an immediate and widespread adoption of the system, in which these restrictions expanded into more and more comprehensive forms until at length the case at bar is reached, with a machine sold and paid for yet claimed still to be subject not only to restriction as to supplies to be used but also subject to any restrictions or condi-

tions as to use or royalty which the company which authorized its sale may see fit, after the sale, from time to time to impose. The perfect instrument of favoritism and oppression which such a system of doing business, if valid, would put into the control of the owner of such a patent should make courts astute, if need be, to defeat its operation. If these restrictions were sustained plainly the plaintiff might, for its own profit or that of its favorites, by the obviously simple expedient of varying its royalty charge, ruin anyone unfortunate enough to be dependent upon its confessedly important improvements for the doing of business.

Through the twenty years since the decision in the *Button-Fastener* case was announced there have not been wanting courts and judges who have dissented from its conclusions, as is sufficiently shown in the division of this court when the question involved first came before it in *Henry v. Dick Co.*, 224 U. S. 1, and in the disposition shown not to extend the doctrine in *Bauer v. O'Donnell*, 229 U. S. 1.

The exclusive right to "vend" a patented article is derived from the same clause of the section of the statute which gives the exclusive right to "use" such an article and following the decision of the *Button-Fastener* case, it was widely contended as obviously sound, that the right existed in the owner of a patent to fix a price at which the patented article might be sold and resold under penalty of patent infringement. But this court, when the question came before it in *Bauer v. O'Donnell*, 229 U. S. 1, rejecting plausible argument and adhering to the language of the statute from which all patent right is derived, refused to give such a construction to the Act of Congress, and decided that the owner of a patent is not authorized by either the letter or the purpose of the law to fix, by notice, the price at which a patented article must be sold after the first sale of it, declaring that the right to vend is exhausted by a single, unconditional sale, the article sold being thereby carried outside the monopoly of the patent law and rendered free of every restriction which the vendor may attempt to put upon it. The statutory authority to grant the exclusive right to "use" a patented machine is not greater, indeed it is precisely the same, as the authority to grant the exclusive right to "vend", and, looking to that authority, for the reasons stated in this opinion we are convinced that the exclusive right granted in every patent must be limited to the in-

vention described in the claims of the patent and that it is not competent for the owner of a patent by notice attached to its machine to, in effect, extend the scope of its patent monopoly by restricting the use of it to materials necessary in its operation but which are no part of the patented invention, or to send its machines forth into the channels of trade of the country subject to conditions as to use or royalty to be paid to be imposed therefor at the discretion of such patent owner. The patent law furnishes no warrant for such a practice and the cost, inconvenience and annoyance to the public which the opposite conclusion would occasion forbid it.

It is argued as a merit of this system of sale under a license notice that the public is benefited by the sale of the machine at what is practically its cost and by the fact that the owner of the patent makes its entire profit from the sale of the supplies with which it is operated. This fact, if it be a fact, instead of commending, is the clearest possible condemnation of, the practice adopted, for it proves that under color of its patent the owner intends to and does derive its profit, not from the invention on which the law gives it a monopoly but from the unpatented supplies with which it is used and which are wholly without the scope of the patent monopoly, thus in effect extending the power to the owner of the patent to fix the price to the public of the unpatented supplies as effectively as he may fix the price on the patented machine.

We are confirmed in the conclusion which we are announcing by the fact that since the decision of *Henry v. Dick Co.*, 224 U. S. 1, the Congress of the United States, the source of all rights under patents, as if in response to this decision, has enacted a law making it unlawful for any person engaged in interstate commerce "to lease or make a sale or contract for sale of goods . . . machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption or resale . . . or to fix a price charged therefor . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use . . . the goods . . . machinery, supplies or other commodities of a competitor or competitors of the lessor or seller where the effect of such lease, sale or contract for resale, or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." (88 Stat. at Large, p. 730.)

Our conclusion renders it unnecessary to make the application of this statute to the case at bar which the Circuit Court of Appeals made of it but it must be accepted by us as a most persuasive expression of the public policy of our country with respect to the question before us.

It is obvious that the conclusions arrived at in this opinion are such that the decision in *Henry v. Dick Co.*, 224 U. S. 1, must be regarded as overruled.

Coming now to the terms of the notice attached to the machine sold to the Seventy-second Street Amusement Company under the license of the plaintiff and to the first question as we have stated it.

This notice first provides that the machine, which was sold to and paid for by the Amusement Company may be used only with moving picture films containing the invention of reissued patent No. 12,192, so long as the plaintiff continues to own this reissued patent.

Such a restriction is invalid because such a film is obviously not any part of the invention of the patent in suit; because it is an attempt, without statutory warrant, to continue the patent monopoly in this particular character of film after it has expired, and because to enforce it would be to create a monopoly in the manufacture and use of moving picture films, wholly outside of the patent in suit and of the patent law as we have interpreted it.

The notice further provides that the machine shall be used only upon other terms (than those stated in the notice) to be fixed by the plaintiff, while it is in use and while the plaintiff "owns said patents." And it is stated at the bar that under this warrant a charge was imposed upon the purchaser graduated by the size of the theater in which the machine was to be used.

Assuming that the plaintiff has been paid an average royalty of \$5 on each machine sold, prescribed in the license agreement, it has already received over \$200,000 for the use of its patented improvement, which relates only to the method of using the films which another had invented, and yet it seeks by this device to collect during the life of the patent in suit what would doubtless aggregate many times this amount for the use of this same invention, after its machines have been sold and paid for.

A restriction which would give to the plaintiff such a potential power for evil over an industry which must be recognized as an important element in the amusement life of the nation, under the

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conclusions we have stated in this opinion, is plainly void, because wholly without the scope and purpose of our patent laws and because, if sustained, it would be gravely injurious to that public interest, which we have seen is more a favorite of the law than is the promotion of private fortunes.

Both questions as stated must be answered in the negative and the decree of the Circuit Court of Appeals is

Affirmed.

Mr. Justice McREYNOLDS concurs in the result.

SUPREME COURT OF THE UNITED STATES.

No. 715.—OCTOBER TERM, 1916.

Motion Picture Patents Company,
vs.
Universal Film Manufacturing Co.,
et al.

On Writ of Certiorari to
the United States Circuit
Court of Appeals
for the Second Circuit.

[April 9, 1917.]

Mr. Justice HOLMES, dissenting.

I suppose that a patentee has no less property in his patented machine than any other owner, and that in addition to keeping the machine to himself the patent gives him the further right to forbid the rest of the world from making others like it. In short, for whatever motive, he may keep his device wholly out of use. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 422. So much being undisputed, I cannot understand why he may not keep it out of use unless the licensee, or, for the matter of that, the buyer, will use some unpatented thing in connection with it. Generally speaking the measure of a condition is the consequence of a breach, and if that consequence is one that the owner may impose unconditionally, he may impose it conditionally upon a certain event. *Ashley v. Ryan*, 153 U. S. 430, 443. *Lloyd v. Dollison*, 194 U. S. 445, 449. *Non debet, cui plus licet, quod minus est non licere*. D. 50, 17, 21.

No doubt this principle might be limited or excluded in cases where the condition tends to bring about a state of things that there is a predominant public interest to prevent. But there is no predominant public interest to prevent a patented tea pot or film feeder from being kept from the public, because, as I have said, the patentee may keep them tied up at will while his patent lasts. Neither is there any such interest to prevent the purchase of the tea or films, that is made the condition of the use of the machine. The supposed contravention of public interest sometimes is stated as an attempt to extend the patent law to unpatented articles, which of course it is not, and more accurately as a possible domination to

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be established by such means. But the domination is one only to the extent of the desire for the tea pot or film feeder, and if the owner prefers to keep the pot or the feeder unless you will buy his tea or films, I cannot see in allowing him the right to do so anything more than an ordinary incident of ownership, or at most, a consequence of the *Paper Bag* case, on which, as it seems to me, this case ought to turn. See *Grant v. Raymond*, 16 Pet. 218, 242.

Not only do I believe that the rule that I advocate is right under the *Paper Bag* case, but I think that it has become a rule of property that law and justice require to be retained. For fifteen years, at least since *Dement v. National Harrow Co.*, 189 U. S. 70, 88-93, if not considerably earlier, the public has been encouraged by this Court to believe that the law is as it was laid down in *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 25 C. C. A. 267, and numerous other decisions of the lower Courts. I believe that many and important transactions have taken place on the faith of those decisions, and that for that reason as well as for the first that I have given, the rule last announced in *Henry v. A. B. Dick Co.*, 224 U. S. 1, should be maintained.

I will add for its bearing upon *Strauss v. Victor Talking Machine Co.*, that a conditional sale retaining the title until a future event after delivery, has been decided to be lawful again and again by this Court. *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 272. I confine myself to expressing my views upon the general and important questions upon which I have the misfortune to differ from the majority of the Court. I leave on one side the question of the effect of the Clayton Act, as the Court has done, and also what I might think if the *Paper Bag* case were not upheld, or if the question were upon the effect of a combination of patents such as to be contrary to the policy that I am bound to accept from the Congress of the United States.

Mr. Justice McKENNA and Mr. Justice VAN DEVANTER concur in this dissent.

Legal Box
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SUPREME COURT OF THE UNITED STATES.

No. 374.—OCTOBER TERM, 1916.

Jesse Isidor Straus, et al., Petitioners, } Certiorari to the Circuit
vs. } Court of Appeals for the
Victor Talking Machine Company. } Second Circuit.

[April 9, 1917.]

Mr. Justice CLARKE delivered the opinion of the Court.

It will contribute to brevity to designate the parties to this proceeding as they were in the trial court—the respondent as plaintiff and the petitioners as defendants.

The plaintiff in its bill alleges: that it is a corporation of New Jersey; that for many years it has been manufacturing, sound-reproducing machines embodying various features covered by patents of which it is the owner, and that, for the purpose of marketing these machines to the best advantage, about August 1st, 1913, it adopted a form of contract which it calls a "License Contract" and a form of notice called a "License Notice," under which it alleges all of its machines have, since that date been furnished to dealers and to the public.

This "License Notice" which is attached to each machine and is set out in full in the bill, declares that the machine to which it is attached is manufactured under patents, is licensed for the term of the patent under which it is licensed having the longest time to run and may be used only with sound records, sound boxes and needles manufactured by the plaintiff; that only the right to use the machine "for demonstrating purposes" is granted to "distributors" (wholesale dealers), but that these "distributors" may assign a like right "to the public" or to "regularly licensed Victor dealers" (retailers) "at the dealer's regular discount royalty"; that the "dealers" may convey the "license to use the machine" only when a "royalty" of not less than \$200 shall have been paid, and upon the "consideration" that all of the conditions of the "license" shall have been observed; that the title to the machine shall remain

in the plaintiff which shall have the right to repossess it upon breach of any of the conditions of the notice, by paying to the user the amount paid by him less five per cent. for each year that the machine has been used. The notice in terms reserves the right to the plaintiff to inspect, test and repair the machine at all times and to instruct the user in its use, "but it assumes no obligation to do so;" it provides that "any excessive use or violation of the conditions shall be an infringement of plaintiff's patent," and that any encroachment or removal of the notice will be considered as a violation of the license. Finally, it provides that at the expiration of the patent "under which it is licensed" having the longest time to run the machine shall become the property of the licensee provided all the conditions recited in the notice shall have been complied with and the acceptance of the machine is declared to be "an acceptance of these conditions."

The contract between the plaintiff and its dealers is not set out in full in the bill but it is alleged that since August 1st, 1913, the plaintiff has had with each of its 7,000 licensed dealers a written contract in which all the terms of the "License Notice" are in substance repeated and in addition it is alleged that each dealer "if he has signed the assent thereto" is authorized to dispose of any machines received from "the plaintiff directly or through a permanent distributing dealer," but subject to all of the conditions expressed in the "License Notice." It is alleged that this contract contains the provision that "a breach of any of the conditions on the part of a distributor will render him liable, not only for an infringement of the patent but to an action on the contract or other proper remedy."

As to the defendants the bill alleges that they conduct a large mercantile business in New York City; that with full knowledge of the terms of the contract, as described, between the plaintiff and its distributors and of the "License Notice" attached to each machine, the defendants "being members of the general unlicensed public," and having no contract relation with the plaintiff or with any of its licensed distributors or licensed dealers, induced "covertly and on various pretenses," one or more of plaintiff's licensed distributors or dealers to violate his or their contracts with the plaintiff, providing that no machines should be delivered to any unlicensed member of the general public until "the full license price" stated in the "License Notice" affixed to each

machine was paid, and thereby obtained possession of a large number of such machines at much less than the prices stated in the "License Notice"; that under the terms of the said license agreement and notice, they have no title to the same, and that they have sold large numbers thereof to the public and are proposing and threatening to dispose of the remainder of those which they have acquired to "the unlicensed general public," at much less than the price stated in the notice affixed to each machine.

The prayer is for an injunction restraining the defendants from selling any of the machines, possession of which they have acquired, from other and further violation of plaintiff's rights under its letters patent and for the usual accounting and for damages.

The District Court regarded the transaction described in the "License Notice" as in substance a sale which exhausted the interest of the plaintiff in the machine, except as to the right to have it used with records and needles as provided for therein, and this right not being involved in this case it dismissed the bill. 222 Fed. 524.

On appeal, the Circuit Court of Appeals affirmed this judgment and remanded the case, but with instructions to allow the plaintiff to amend its bill "if it be so advised." 225 Fed. 535.

The bill was thereafter so amended as to allege that the defendants had in their possession a large number of machines which they had obtained from plaintiff's distributors and dealers at much less in each case than the price stated in the "License Notice," and that they were proposing to dispose of these machines to the "unlicensed general public" at less than the price stated in the "License Notice" in disregard of plaintiff's rights.

Again the District Court, on the same ground as before, sustained a motion to dismiss the bill, but the Circuit Court of Appeals reversed this holding (230 Fed. 449) and the case is here for review on certiorari.

The abstract of the bill which we have given, makes it plain: That whatever rights the plaintiff has against the defendants must be derived from the "License Notice" attached to each machine, for no contract rights existed between them, the defendants being only "members of the unlicensed general public;" and that the sole act of infringement charged against the defendants is that they exceeded the terms of the license notice by obtaining machines from the plaintiff's wholesale or retail agents and by selling them at less than the price fixed by the plaintiff.

It is apparent from the foregoing statement that we are called upon to determine whether the system adopted by the plaintiff was selected as a means of securing to the owner of the patent that exclusive right to use its invention which is granted through the patent law, or whether, under color of such a purpose, it is a device unlawfully resorted to in an effort to profitably extend the scope of its patent at the expense of the general public. Is it the fact, as is claimed, that this "License Notice" of the plaintiff is a means or agency designed in candor and good faith to enable the plaintiff to make only that full, reasonable and exclusive use of its invention which is contemplated by the patent law or is it a disguised attempt to control the prices of its machines after they have been sold and paid for?

First of all it is plainly apparent that this plan of marketing adopted by the plaintiff is, in substance, the one dealt with by this court in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 573, and in *Bauer v. O'Donnell*, 229 U. S. 1, adroitly modified on the one hand to take advantage, if possible, of distinctions suggested by these decisions, and on the other hand to evade certain supposed effects of them.

If we look through the words and forms, with which the plaintiff has most elaborately enveloped its purpose, to the substance and realities of the transaction contemplated, we shall discover several notable and significant features. First, while as if looking to the future, the notice, in terms, imposes various restrictions as to title and as to the "use" of the machines by plaintiff's agents, wholesale and retail, and by the "unlicensed members of the public," for itself, the plaintiff makes sure, that the future shall have no risks, for it requires that all that it asks or expects at any time to receive for each machine must be paid in full before it parts with the possession of it.

Second, while in terms the "use" of each machine is restricted and forfeiture for failure to strictly comply with the many conditions and requirements of the notice is provided for, this system, elaborate to the extent of confusion, fails utterly to provide for any evidence of a qualified title in any public office or in any public record, and no requirement from one place to another taking the machine with them, as would very certainly be required if the plaintiff intended to enforce the rights so elaborately

asserted in this notice,—if the system were really a genuine provision designed to protect through many years to come the restricted right to "use" and the seemingly qualified title which it purports to grant to dealers and to the public, from being exceeded or departed from.

Third, The fact that under this system "at different times" "large numbers" of machines, as is alleged in the plaintiff's bill, have been "covertly" sold to the defendants by the plaintiff's wholesale and retail agents at less than the price fixed for them, is persuasive evidence that the transaction is not what it purports on its face to be. If it were a reasonably guarded plan, really intended to keep the plaintiff in touch with each of its machines until the expiration of the patent of latest date, for the purpose of insisting upon its being used in the manner provided for in the "License Notice" the plaintiff's prompt and sufficient remedy for such an invasion of its right as is claimed in this case would be found in its sales department or rather in its "license" department, and not in the courts. That the plaintiff comes into court with a bill to enjoin the defendants from reselling machines secretly sold to them in large numbers by the plaintiff's agents indicates very clearly that at least until the exigency out of which this case grew, arose, the scheme was regarded by the plaintiff itself and by its agents simply as one for maintaining prices by holding a patent infringement suit in *terrore* over the ignorant and the timid.

And finally, while the notice permits the use of the machines, which have been fully paid for, by the "unlicensed members of the general public," significantly called in the bill "the ultimate users," until "the expiration of the patent having the longest term to run" (which, under the copy of the notice set out in the bill, would be July 22nd, 1930) it provides that if the licensee shall not have failed to observe the conditions of the license, and the Victor Company shall not have previously taken possession of the machine, as in the notice provided, then, perhaps sixteen years or more after he has paid for it and in all probability long after it has been worn out or become obsolete and worthless "it shall become the property of the licensee".

It thus becomes clear that this "License Notice" is not intended as a security for any further payment upon the machine, for the full price, called a "royalty", was paid before the plaintiff parted

with the possession of it; that it is not to be used as a basis for tracing and keeping the plaintiff informed as to the condition or use of the machine, for no report of any character is required from the "ultimate user" after he has paid the stipulated price; that, notwithstanding its apparently studied avoidance of the use of the word "sale" and its frequent reference to the word "use," the most obvious requirements for securing a bona fide enforcement of the restrictions of the notice as to "use" are omitted; and that, even by its own terms, the title to the machines ultimately vests in the "ultimate users," without further payment or action on their part, except patiently waiting for patents to expire on inventions, which, so far as this notice shows, may or may not be incorporated in the machine. There remains for this "License Notice" so far as we can discover, the function only, of fixing and maintaining the price of plaintiff's machines to its agents and to the public, and this we cannot doubt is the purpose for which it really was designed.

Courts would be perversely blind if they failed to look through such an attempt as this "License Notice" thus plainly is to sell property for a full price, and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest. The scheme of distribution is not a system designed to secure to the plaintiff and to the public a reasonable use of its machines, within the grant of the patent laws, but is in substance and in fact a mere price-fixing enterprise, which, if given effect, would work great and widespread injustice to innocent purchasers, for it must be recognized that not one purchaser in many would read such a notice, and that not one in a much greater number, if he did read it, could understand its involved and intricate phraseology, which bears many evidences of being framed to conceal rather than to make clear its real meaning and purpose. It would be a perversion of terms to call the transaction intended to be embodied in this system of marketing plaintiff's machines a "license to use the invention." *Bauer v. O'Donnell*, 229 U. S. 1, 16.

Convinced as we are that the purpose and effect of this "License Notice" of plaintiff, considered as a part of its scheme for marketing its product, is not to secure to the plaintiff any use of its machines, and as is contemplated by the patent statutes, but that its real and poorly-concealed purpose is to restrict the price of them, after the plaintiff had been paid for them and after they have passed into

the possession of dealers and of the public, we conclude that it falls within the principles of *Adams v. Burke*, 17 Wall. 453, 456; and of *Bauer v. O'Donnell*, 229 U. S. 1; that it is, therefore, invalid, and that the District Court properly held that the bill must fail for want of equity.

It results that the decree of the Circuit Court of Appeals will be reversed and that of the District Court affirmed.

Reversed.

Could be well put

**Legal Department Records
Motion Pictures - Case Files**

***Richard F. Outcault v.
Edison Manufacturing Company and Percival L. Waters***

This folder contains material pertaining to the suit brought by cartoonist Richard F. Outcault against the Edison Manufacturing Co. and Percival Waters of the Kinetograph Co. in the U.S. Circuit Court for the Southern District of New York. The case was initiated in April 1904 and involved the alleged infringement of Outcault's copyright for his Buster Brown cartoon. The selected items include an Outcault cartoon and a description of a motion picture based on the cartoon, along with the bill of complaint and affidavits by Waters and Edwin S. Porter. Among the items not selected are the defendants' demurrer to the bill of complaint, the motion for dismissal, letters and memoranda pertaining to the progress of litigation, and documents that duplicate information in selected material.

THE KINETOGRAPH COMPANY
NO. 41 EAST 23RD STREET
NEW YORK
—
TELEPHONE 1887, GRAMERCY

Characters and scenes in Buster Brown picture.

- 1st. scene, Outcault making a sketch of Buster
- 2nd. " Busters Revenge on the Tramp. Buster, Cook, & Tramp, Mama & Tige.
- 3rd. " Buster & the Dude. Buster, 2 young Ladies, Young Man with a dog, Tige. *(Mamma)* *dog fight.*
- 4th. scene Buster makes room for his Mama at Bargain Counter. Salesman, a number of young ladies, Buster comes in with Tige and Mama, Tige sits on stool, Buster whispers to Tige.
- 5th. " Busters Joke on Papa. Kitchen scene, Cook, Lobster Man, Mama, Buster, Tige. Bed-room scene, papa sitting in chair, Papa goes out, Buster comes in with Lobers puts them in Bed, papa comes back goes to bed, in comes Buster and Mama another scene, Buster eating with Mama *Pillars*
- 6th. " Busters Dog to the Rescue. Cook, Buster, Mama and Tige. Cooks puts Crumblers on shelf, Buster tries to go up by ladder, Mama comes in, ties Buster to chair, tige comes in climbs ladder and gets crumblers and eats with Buster.
- 7th. " Buster & Tige put a Baloon Vender out of Business. Mama, Tige, and Buster, four other Dogs, Balloon Man. Balloon man walking in street, Mama & Buster come along, Buster bunks into Balloon man, and is struck by the latter, then in runs tige and jumps at the Balloon man and four other Dogs. end.

*a little girl Poses as Buster
Tige - Mamma -*

Circuit Court of the United States,
for the Southern District
of New York.

Richard F. Outcault,
Complainant,
v.
The Edison Mfg. Co. et. al.
Defendants.

(Copy.)

Bill of Complaint.

Circuit Court of the United States.

Southern District of New York.
In Equity.

-----x
Richard F. Outcault,
Complainant,
against
The Edison Manufacturing Company
and Percival L. Watters,
defendants.
-----x

Bill of complaint.

To the judges of the Circuit Court of the United
States for the Southern District of New York, in the Equity
Circuit.

Richard F. Outcault of Flushing, Long Island,
and a citizen of the State of New York, brings this bill
against The Edison Manufacturing Company, a corporation
organized under the laws of the State of New Jersey, and
Percival L. Watters, doing business in the City of New York
under the name, firm and style of The Kinetograph Company,
and thereupon your orator complains and says:-

That Richard F. Outcault is a citizen of the
United States and is the true and original author, designer
and proprietor of a series of pictures, sketches and car-
toons collectively designated and known by the name and
title of "Buster Brown", which said design, sketch or car-
toon was not known or used by others, before the origin,
invention, discovery and design thereof by the said Richard
F. Outcault.

That the said Richard F. Outcault on or about the

25th day of May, 1902, before an application for a copy-right on said name, design, picture and cartoon of Buster Brown, had been made, for valuable consideration duly assigned his right, title and interest and license to manufacture, use and vend the said article etc. to the New York Herald Company.

That the said New York Herald Company thereupon afterwards before publication did deposit in the mail addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the design, picture, sketch or cartoon known as Buster Brown, and within ten days of the publication thereof, did deposit in the mail addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of such copy-right article.

That the Librarian of Congress duly recorded the name of such copy right articles, in a book kept for that purpose, and duly received his fees for the same, and the New York Herald Company having fully and in all respects complied with all requirements of the law in that behalf, and within ten days after its publication having filed two copies of said design, sketch, or cartoon, known as Buster Brown, with the Librarian of Congress who duly issued his certificate of Copyright of the said on or about the 25th day of May, 1902, and on or about the said 25th day of May 1902, and by virtue thereof the said New York Herald Company became and were the sole owners of all the rights and privileges granted and secured in or intended to be secured in and by said copyright, as by reference to the

certificate thereof will more fully appear.

And your orator further shows unto your Honors that on the 1st day of October, 1902, the said New York Herald Company by their assignment of that date duly executed, for valuable consideration, conveyed to your orator all their rights, title and interest in and to the design, sketch and cartoon secured by the said copyright and with the exclusive rights and license therein to manufacture use and vend the copy righted articles, during the unexpired term of said copyright, and of all extensions and renewals thereof, as by the said instrument here in court to be produced, if required, will more fully appear.

And your orator further shows that he is in the full enjoyment of the rights and interests acquired by him as aforesaid, and that said rights and interests have been and are of great value to your orator, and your orator is entitled to all the damage occasioned by the infringements of the said copyright by the manufacture, sale or use of the name, sketch/ design etc., known as Buster Brown, made in violation of the said copyright and is by law, entitled to sue for, and receive the same to his own use.

And your orator further shows unto your Honors, that he believes, and therefore charges the fact to be that he, the said Richard F. Outcault, was the originator and first designer, sketcher and cartoonist of the name, sketch, and design, copyrighted by him as aforesaid, and known as Buster Brown, and described and claimed in the said copyright a s aforesaid, and that the same was not known or use

by any other persons before the authorship and origin by him, the said Richard F. Outcault.

And your orator further shows unto your Honors, that since on or about the 14th day of March, 1904, the defendants well knowing the premises and the rights and privileges secured to your orator, the said Richard F. Outcault, by the said copyright, but contriving to injure your orator and to deprive him of the profits, benefits and advantages which might otherwise have accrued to him at the city of New York, within the District aforesaid, and at other places, have unlawfully and wrongfully made or use or sold or exhibited, and are now unlawfully and wrongfully making or using or selling or exhibiting large quantities of machinery, contrivances, films etc., for the exhibition of pictures, sketches and cartoons of Buster Brown, so copyrighted by the New York Herald Company assigned to your orator, and also making using or selling large quantities of pictures, sketches and cartoons, known as Buster Brown, and (described and claimed in said copyright, and for the purposes specified in said copyright, and in violation of the exclusive privileges therein and thereby granted to your orator as aforesaid, and in infringement of said copyright, and of the claims therein contained; but what quantity of the things copyrighted, produced as heretofore referred to, the said defendants have made or used or sold, or exhibited your orator does not know and cannot state, but upon information and belief your orator avers that they have made or used or sold large quantities of the same, and are now making or using or selling large

quantities of the same and that they have derived and received and are still deriving and receiving, from such manufacture, use and sale great gains and profits, but to what amount your orator is ignorant and cannot set forth, but your orator believes the same to be the full amount of five thousand dollars, and so charge the fact to be, and prays that the defendant may be required to make a disclosure of all such gains and profits.

And your orator further avers that the defendants continue to make or use, or sell or exhibit such pictures, sketches and cartoons and designs of Buster Brown, and machinery, contrivances, films etc, for the manufacture, use or sale of the same, and refuse though warned and requested, to desist from such manufacture, use and sale, and exhibitions, or to pay to your orator such gains and profits, by means whereof the defendants have injured and are still greatly injuring your orator, and have deprived and are still depriving your orator of, and have prevented and are still preventing your orator from receiving the gains and profits from the use of the exclusive right to use the pictures, design, sketch and cartoon known as Buster Brown, claimed in said copyright which your orator otherwise and but for the said wrongful acts and infringements of the said defendants would have obtained and received.

And your orator prays that the said defendants may be compelled, by decree of this court, to account for and pay over to your orator all such gains, profits as have accrued or arisen to, or been earned or received by the de-

4

tendants, or to which they may be entitled by reason of such unlawful manufacture and use and sale and exhibition by them of such pictures, sketches, cartoons and designs, manufactured in accordance with the designs of said copy-right, and all such gains and profits as your orator would have received but for the said unlawful acts and doings and infringements of the said defendants.

And may it please your Honors, the premises considered, to grant unto your orator the writ of injunction issuing out of and under the seal of this Honorable court, or issued by one of your Honors according to the form of the statute in such case made and provided, perpetually enjoining and restraining the said defendants, their clerks, attorneys, agents, servants, workmen and employees, from directly or indirectly, making or using or selling or exhibiting to others any pictures, sketches, design or cartoon of Buster Brown, described and claimed in the said copy-right, or any machinery, contrivance or film for the manufacture of any picture, design or cartoon known as Buster Brown, as described in said copyright.

And may it please your honors to grant to your orator a provisional or preliminary injunction issuing out of and under the seal of this honorable court, enjoining and restraining the defendants, their attorneys, clerks, agents, servants, workmen and employees, and each and every of them during the pendency of the suit and to the same purport, tenor and effect herein before prayed for in regard to said perpetual injunction.

And that your orator may have such further or other relief in the premises as the nature of the circumstances of this case may require and to this honorable court may seem meet.

And may it please your honors to grant unto your orator a writ of subpoena of the United States of America issuing out of and under the seal of this Honorable Court, directed to the said defendants, commanding them on a day certain therein to be named, and under a certain penalty to be and appear in this Honorable Court, then and there to answer all and singular the premises, and to stand to, perform and abide such further order, direction and decree as may be made against them.

And your orator ailin duty bound will ever pray &

Leon Raunheim:

Solicitor for complainant.

Leon Raunheim,

Of counsel for complainant.

United States of America.

Southern District of New York. SS:-

Richard F. Outcault, being duly sworn, deposes and saith that he is the complainant in the foregoing bill named, and has read the same, and knows the contents thereof. That the said bill is true of his own knowledge except as to those matters which are therein stated to be on his information and belief, and as to those he believes it to be true.

Sworn to before me this 30 day of

April, 1904.

R. F. Outcault.

J. Sherman Moulton,

Notary Public 187 N. Y. County.

(Seal.)

(Endorsed.)

Circuit Court of the United States. Southern
District of New York. Richard F. Outcault, complainant,
against The Edison Manufacturing Company and Kinetograph Co.
Company, defendants. Bill of Complaint. Leon Raunheim,
solicitor for complainant, 38 - 44 Court Street, Brooklyn,
N. Y. U. S. Circuit Court. Filed May 6, 1904. South-
ern District. New York. John A. Shields, Clerk.

May 10, /04.

Outcault vs. Edison Mfg. Co.

J. R. Schermerhorn, Esq.,

Edison Manufacturing Co.,

Orange, N. J.

Dear Sir:-

Your favor of the 7th inst. has been received with letter and enclosure from Mr. Dolbeer, and I am giving this matter proper attention.

In view of Mr. Outcault's apparently unfriendly position and of his failure to appreciate the disinterested nature of our efforts to relieve him of embarrassment, I advised Mr. Moore to go ahead with the "Buster Brown" films. I requested him, however, to withhold the sale of the "Buster Brown in a Department Store" film until I could compare it with the original copyrighted picture. To this end, I asked Mr. Porter to have Mr. Smith make a photograph of the original Outcault picture in the New York Herald, and I am daily expecting this in order that I can compare the pictures with our film.

Yours very truly,

F.L.D./M.

CIRCUIT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF NEW YORK.

RICHARD F. OUTCAULT,
Complainant,

- against -

THE EDISON MANUFACTURING COMPANY
and PERCIVAL L. WATERS,
Defendants.

IN EQUITY.

IN EQUITY.

CIRCUIT COURT OF UNITED STATES
SOUTHERN DISTRICT OF NEW YORK.

RICHARD F. OUTCAULT,
Complainant,

- against -

THE EDISON MANUFACTURING COMPANY
and PERCIVAL L. WATERS,
Defendants.

(Copy)

AFFIDAVIT OF PERCIVAL L. WATERS.

UNITED STATES OF AMERICA }
STATE OF NEW YORK } SS.
COUNTY OF NEW YORK. }

PERCIVAL L. WATERS, being duly sworn, on oath states that he is one of the defendants herein; that his business is that of selling machines, films, etc. for moving pictures and exhibiting moving pictures; that he has a place of business located at 41 East 21st Street, New York City; that he purchases his said goods from the Edison Manufacturing Company; affiant states that he has read the bill of complaint filed herein and denies that he has ever copied or attempted to copy or made any colorable imitation of the alleged copyrighted article described or attempted to be described in the said bill of complaint; he also denies that he has ever made, used or sold or exhibited any machinery, contrivances, film, etc., for the exhibition of pictures, sketches, cartoons alleged to be copyrighted in said bill of complaint, nor is he now making, using or selling any pictures, sketches, and cartoons described and claimed in the alleged copyright mentioned in said bill of complaint;

Affiant further states he has read the affidavit of plaintiff filed herein dated April 30th, 1904; he denies that the said Rising therein mentioned ever was his agent

FRANK E. BRADLEY,
ATTORNEY AND COUNSELLOR AT LAW,
DUN BUILDING, 295 BROADWAY,
NEW YORK, N. Y.

or in his behalf approached plaintiff for the purpose of making any representations whatsoever, nor did affiant have any knowledge of the fact that the said Rising was going to see plaintiff at the time;

Affiant also denies that he ever admitted to plaintiff that any arrangements whatever had not been made with Mr. Raymond as alleged in the said affidavit; in fact, the first intimation affiant had that there was any one by the name of Raymond connected in the matter, came from plaintiff himself at a conversation had about the first of April with plaintiff when affiant learned for the first time that there was such a person by being told of the fact by plaintiff himself.

Subscribed and sworn to
before me this 20th day
of May, 1904.

} *Arnold L. Waters,*

(Seal) *M. A. Hoover,*
Notary Public,
New York County.

CIRCUIT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF NEW YORK.

RICHARD F. OUTCAULT,
Complainant,

- against -

THE EDISON MANUFACTURING COMPANY
and PERCIVAL L. WATERS,
Defendants.

IN EQUITY.

IN EQUITY.

CIRCUIT COURT OF UNITED STATES
SOUTHERN DISTRICT OF NEW YORK.

RICHARD F. OUTCAULT,
Complainant,

- against -

THE EDISON MANUFACTURING COMPANY
and PERCIVAL L. WATERS,
Defendants.

AFFIDAVIT OF EDWIN S. PORTER.

UNITED STATES OF AMERICA }
STATE OF NEW YORK } SS.
COUNTY OF NEW YORK }

EDWIN S. PORTER, being duly sworn, on oath states that he is employed by the Edison Manufacturing Company, one of the defendants herein as a Photographer to take pictures for the Kinetoscope; affiant states that he has read the Bill of Complaint filed herein, and of his knowledge, and he believes he is in a position to know it to be a fact, that the said Edison Manufacturing Company have never copied or attempted to copy or make any colorable imitation of the alleged copyrighted article described or attempted to be described in the said Bill of Complaint, and ~~as~~ that they have never made, used or sold or exhibited any machinery, contrivances, film, etc. for the exhibition of pictures, sketches, cartoons alleged to be copyrighted in said bill of complaint, nor are they now making, using or selling any pictures, sketches, and cartoons described and claimed in the alleged copyright mentioned in said bill of complaint;

Affiant further states that he has read the affidavit of plaintiff filed herein dated April 30th, 1904, and denies the statement therein made that the said Will S. Rising referred to was an agent of the Edison Manufacturing Company; affiant states that the said Rising had been employed by him

FRANK E. BRADLEY,
ATTORNEY AND COUNSELLOR AT LAW,
DUH BUILDING, 280 BROADWAY,
NEW YORK, N. Y.

and act to pose, in various pictures from time to time, and that one day said Rising suggested to affiant that as he was an uncle of the said plaintiff he might be able to secure plaintiff's consent to the construction of a "Buster Brown" film; the suggestion arose with the said Rising and affiant told him if he could obtain this, it might be worth his while; thereupon, Rising went away and returned shortly with a communication in plaintiff's handwriting of which the following is a copy:

"Wednesday

"March 2nd 1904

"Mr. Ed Porter

"Manager Kinetograph Co.

"Dear Sir

"You have my permission to use Buster Brown on the machine- and I will be in early next week and pose for you in the act of drawing Buster if you like.

"Most Sincerely Yours,

"R. F. Outcault"

Up to this time, affiant never had heard of any one by the name of Raymond in this matter, nor did he know that there was a "Buster Brown" show on the road; a few days thereafter, plaintiff, on his own suggestion, came to affiant's gallery and posed for the opening scene of the "Buster Brown" film; several conversations were had with plaintiff in which plaintiff expressed not only his willingness but his pleasure over the idea of having the film publicly exhibited, not only for the advertisement of the character of "Buster Brown" but also for whatever advantage there might be in it to the said Rising; plaintiff said among other things on more than one occasion that Rising was in financial difficulties and that whatever Rising got out of it, he would be satisfied with;

Affiant further states that the film ~~was~~ thereupon

was made up and perfected and exhibited to the public with the knowledge and permission of the plaintiff, the said representations as shown on the screen being original in idea and entirely dissimilar in every respect, not only as to characters, scheme, etc., from the alleged copyrighted article mentioned in the said bill of complaint.

Subscribed and sworn to
before me this 20th day
of May, 1904.

Edwin J. Porter

M. A. Kasser

NOTARY PUBLIC
COUNTY OF NEW YORK

Memo. for Waters' Affidavit

" After that understanding that Rising was posing in moving pictures for the Edison company, something was later said about his having made an arrangement with Outcault for the making of a series of "Buster Brown" pictures. The idea of a "Buster Brown" film originated with Porter and Rising suggested that he could get Outcault's permission on account of his relationship. No knowledge was had at this time by either Waters or Porter that Outcault had parted with any of his rights whatever that were in the name ~~of~~ "Buster Brown" or the copyrighted cartoons. (It was Rising's own idea of going to Outcault to get the permission). Porter suggested to Rising that he would make it worth his while if he got the permission from Outcault.

"The next I heard of the "Buster Brown" pictures was one day when Mr. Outcault came in my office and said that he had just been up in the Gallery posing for the opening strip of the "Buster Brown" film (Ascertain this date). He was very much interested in the matter and suggested that he would be very glad to do anything for the Edison people that he could in posing for pictures. He said he expected no compensation for himself-- whatever arrangement was made with Rising was all right. He said the "Buster Brown" subject was such a popular one, he had no doubt the pictures would make quite a hit in the kinetograph and that he would be interested to see his own picture. He said if he could get up something else later, he would be glad to do it.

The day of this conversation was the first time affiant had met plaintiff since they had formerly met in Paris in 1899, and there was sort of a talking over of old times. Outcault also stated that he knew Mr. Edison very well and had met him in ~~Paris~~ Europe and was personally with Mr. Edison quite often in Paris, and for that reason he was

very glad to be of any assistance to Mr. Edison or his interests.

The next thing affiant heard in connection with the matter was a letter received from Mr. Frank W. Sanger dated March 28th, 1904. "On the same date, plaintiff called to see Mr. Porter and dropped in my office stating that he had been informed ~~xxx~~ of considerable trouble about the "Buster Brown" pictures; that it would seem he had given the right of these pictures to some theatrical concern whose name was not then disclosed by plaintiff. I told him that I very much regretted any trouble as I felt we were old acquaintances and it seemed too bad any false move of his should have been embarrassing to him and that if there was anything in the matter I could do I would be only too glad to do it, and he then suggested that I see Mr. Raymond whom he claimed had the rights from Mr. Sanger (This is the first time affiant ever heard of Raymond in connection with this matter). I asked him then, who is Mr. Raymond, and he said he is the one who has the "Buster Brown" show out and is president of the Morgan & Wright Lithographing Co. He suggested that I see Mr. Raymond and I told him at the time it was impossible to get out of the office, but I would meet him later on when I could. He said he was going to Mr. Raymond's office immediately and in the course of a short time would call me on the 'phone. He said that he had talked with Mr. Raymond in the matter who was very liberal in his views and was willing to talk the matter over with the view of effecting some satisfactory arrangement regarding the pictures so as not to embarrass him in the contract which he had with Raymond. He called me on the telephone a little later and said that Mr. Raymond would see me at an hour named. Pursuant to that arrangement, I called at Mr. Raymond's office and talked the matter over with him and he stated that he had the exclusive rights from Outcault and that the pictures had been made without his knowledge, further claiming that his

rights were being infringed. I asked him if he had any suggestions to make with regard to the pictures and he said none whatever, and I then asked him if it were possible for the owners of the pictures to suggest a royalty basis to me. He said he would think the matter over and asked me to call at a later date. I then called by appointment about two days after. Mr. Raymond stated he had thought the matter over and decided the pictures must not be exhibited. I asked him to give me this in writing, which he did in the form of a letter dated April 2nd, 1904. Mr. Raymond told me that he had exclusive rights to "Buster Brown" and I then suggested it was rather queer that Mr. Outcault should have gone ahead with the arrangement which he had made with Mr. Porter. Mr. Raymond then laughingly remarked that if Outcault were up on legal matters he would probably not be a good cartoonist. I told Mr. Raymond I was very sorry we could not come to an arrangement so far as I was concerned and that until the matter was finally adjusted I would give Outcault what assistance I could in light of the embarrassing situation he was in between the two parties.

At the time I had five or six sets of the film, and immediately discontinued the use of them temporarily which was considerable financial loss.

Affiant further states that he expressly stated to the plaintiff that he would stop using the pictures as a matter of courtesy to the plaintiff and not as a matter of legal obligation; and the same statement affiant made to Mr. Raymond.

Affiant further states that never at any time did he cause the said Will S. Rising to make any representations to the plaintiff or anyone else that the "Buster Brown" pictures referred to herein were to be used in connection with Mr. Raymond nor did he ever hear anyone say that the said Raymond had made such statements until a matter of about two weeks before the date of this affidavit when the said

plaintiff called upon affiant and stated that he understood that Rising had gotten the privilege for the pictures for Mr. Raymond's show (Find that date).

In the first conversation with Outcault ~~in~~ commenting upon the value of the "Buster Brown" pictures, it was subject of general remark by Outcault, Porter and affiant that the "Buster Brown" was so prominent before the people, there would be very general sale for the pictures, and the plaintiff at the time knew it was contemplated that the films would be used for sale. Outcault asked affiant when and where the pictures would be exhibited and he was told it was affiant's intention to put them on in all the theatres possible as quickly as they were finished.

murder - time and days -

Edmund S. Porter, 211 & 126 St

11 years old girl

white dress - with long

red collar -

that white felt under her

white hair -

not copy of character

Memo. for Affidavit of Mr. Porter.

The idea first originated by a man named Anderson suggesting a scene of a boy stealing jam (Buster Brown then not thought of). Then Mosier came along with a trained dog; assembled boy and dog into jam scene. This led up to assembling a series of these pictures on different subjects. Dyer was consulted to see if there was any infringement in this. Advised later by Dyer than no infringement was made and they could even use the title. Porter had carefully abstained from copying any of the original "Buster Brown" cartoons in his subjects. About five subjects in the series up to that time. Some time the latter part of February or first of May, Rising said to Porter, "Dick Outcault is a nephew of mine, and I think I could get his permission to use the name "Buster Brown" (This idea had never occurred to Porter before this time). I stated to Rising, "All right" and that if he could secure permission from Outcault to use the title, I would make it worth his while. I gave him money to go to Flushing to pay car fare and expenses. Rising, I think went over that afternoon or the following day, returning with the letter of March 2nd from Outcault, and said everything was all right. This is the only letter Porter had ever received from Outcault. Porter knows writing to be Outcault's because he has compared it with Outcault's signature on his cartoons.

"I told Rising I was very anxious to wind up a series of pictures and that awaiting until the following Monday or Tuesday would delay getting them out and I suggested that I go to Flushing, take my camera and take the picture of Outcault making a sketch of "Buster Brown", Outcault himself having suggested that he pose for that, as stated by Rising."

Within a day or two Rising and Porter went over to Outcault's house and found he was very busy. "We had quite a chat with him in general and he spoke of the "Buster Brown"

show and Raymond, and that was my first knowledge that there was a "Buster Brown show in existence. He spoke of the business they were doing, and during our conversation he said the great trouble with the show was there was not enough "Buster" in it to please the children and ladies; that the success of the "Foxy Grandpa" show was that it was confined to the boys and grandpa. He mentioned at the time a vaudeville turn that they used in the play, the six Cuttys; that they were paying \$600 a week for, and it had no bearing on the 'Buster Brown' show. I suggested why wouldn't it be a good idea if the pictures were a success to have Mr. Raymond put a machine on showing "Buster Brown". He thought it was a very good idea and said he would suggest it to Mr. Raymond. He then said, "I am very busy, there is a gentlemen upstairs for whom I am making a sketch" and he suggested that I come up with him and wait for Rising who was talking to some member of the family; Outcault said he could not pose for us that day, but when Rising returned he said, "Now, I have an engagement with Pach, the photographer on Broadway, to pose for a picture on Sunday morning; why can't I kill two birds with one stone and stop in your place Sunday?" The following Sunday he came there and posed for the picture. After securing his sanction for using the title, we thought it would be a good idea to put in one more scene, one of his own, the Bargain Counter. This is the reason the "Bargain Counter" scene was added. At this time and at other times there were conversations with Outcault in which it was thoroughly understood that defendants were going to market these goods as they saw fit.

In talking about Rising on the day we called at Outcault's home, he said, "Will is in hard luck" and that he was merely doing this for Will's benefit; that anything Will got out of it he would be satisfied with. Outcault made practically the same statement when he called on Mr. Waters. After the receipt of the first Sanger letter by the Edison Company, Outcault called at Waters' office and Porter was

Present, and Outcault made, in effect, the same statement that he did this solely for Rising's benefit in the hope that he might get some benefit out of it. Only the three named were present at that time.

**Legal Department Records
Motion Pictures - Case Files**

Triple Damage Suits

This folder contains material pertaining to damage suits brought against the Motion Picture Patents Co., Thomas A. Edison, Inc., and other licensed manufacturers by the Chicago Film Exchange, the Theatre Film Service of San Francisco, and other licensed and unlicensed exhibitors. Most of the cases were initiated in April and May 1916, after the federal government's antitrust case against the Motion Picture Patents Co. was settled by decree in February. The plaintiffs sought triple damages from the defendants under the provisions of the Clayton Antitrust Act of 1914. The selected items include correspondence by Edison and by Delos Holden and Henry Lanahan of the Legal Department concerning the defense and the eventual settlement of the suits. Among the items not selected are bills of complaint and correspondence regarding the progress of litigation, legal fees, and legal representation.

GEORGE F. SCULL
SINGER BUILDING, 149 BROADWAY
NEW YORK CITY

PATENTS AND PATENT CAUSES

*Mr. Holden
Please not*
*Holden. I have sent
memo to Mr. Edison
Chas. Edison & members*
12/9/20

Box 63

December 19th, 1916.

Delos Holden, Esq.,
Legal Dept., Thomas A. Edison, Inc.,
Orange, N.J.

My dear Mr. Holden:--

Confirming my telephone message to Mr. Unger, you will undoubtedly be pleased to learn that the Chicago Film Company triple damage suit, the first of all of them to be reached on the calendar, was put over by Judge Learned Hand this morning to the May, 1917 term. He did this because yesterday the Supreme Court set April 9th as the date for the argument of the appeal in the Government case. Of course, this precedent there can be no question that the remaining triple damage suits will likewise be postponed, as they are reached, to the same term.

Incidentally, it is highly improbable that the Government will be ready to argue the appeal in the Government case on April 9th, so that it is more than likely that there will be no decision by the Supreme Court until next Fall.

Yours very truly,

George F. Scull

CFS/LMB

April 7th, 1917.

Robert H. McCarter, Esq.,
Prudential Bldg.,
Newark, N.J.

My dear Mr. McCarter:--

Pursuant to your suggestion, I saw Judge Learned Hand yesterday afternoon at the close of his court and had quite a long talk with him. He remembered that he had put over the cases to the May term and when I told him that another case which was not on the calendar at that time would possibly be reached in April, he said "of course that will also go over to the May term". Later on he looked up the Clerk's calendar and found that in no event would the Sampliner case be reached before the middle of the month, and he said that in any event, he would not have time to try it this month even if the plaintiff attempted to press it.

Next month Judge Mayer will hold the common law calendar and Judge Hand said that he would speak to Judge Mayer about the situation and that I should see Judge Mayer some time next week, which of course, I shall do.

There is a possibility apparently, by reason of two or three additional judges who will be here in June, that one of the cases might be tried then. I rather gathered the impression that Judge Hand would not be inclined himself to hold up the trial of these cases if plaintiffs urged them, for he remarked that he thought the defendants had already received considerable consideration.

It was quite humorous to see the quick way in which he assured me that they (the judges) would not permit their courts to be tied up for a whole year in the trial of these cases, this remark being made when I said there were twelve of them and that probably it would take a month to try each. I told him that he should not blame us; that so far as we are concerned, we did not care if they were never tried, and that we certainly did not bring the suits.

As I have said above, I shall see Judge Mayer this coming week and probably shall be able to write you more

Robert H. McCarter, Esq.

-2-

4/7/17.

definitely but it is possible that we may not be able to hold up the trial of at least one of these cases later than June.

Yours very truly,

George F. Scull

GFS/LMB

COPY

GENERAL FILM COMPANY

(INCORPORATED)

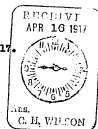
TELEPHONE
MADISON SQUARE 3532

440 FOURTH AVENUE

CABLE ADDRESS
GENFILM, NEW YORK

NEW YORK

April 14, 1917.



Thomas A. Edison, Inc.,
Orange, N. J.

Gentlemen:-

At a hearing before Judge Mayer held Thursday, April 12th, counsel for plaintiffs and defendants in the treble damage suits being present, and at which the defendants requested a postponement of the trials of these cases until after October 1st, when the hearing on the appeal in the Government Trust suit will be had before the Supreme Court; the Court ordered the trials to begin on the second Monday in May, the Chicago Film Exchange case to be taken up first.

It is now of extreme importance that our counsel concentrate on preparation for trial. The question of fees needs immediate attention.

My understanding of the legal representation for the various defendants is as follows:

Thomas A. Edison, Inc.	By McCarter & English
Motion Picture Patents Co.)	By Mr. Kingeley
Biograph Co.)	
Essanay Manufacturing Co.)	
Selig Polyscope Co.)	By Mr. Henry Melville
George Kleine)	
Vitagraph Company	By Mr. Edmonds
Pathe	By Coudart Bros. (Mr. Samuels)
General Film Co.	By Mr. R. O. Moon
Various defendants	By Mr. R. O. Moon, Mr. Allen G. and Mr. Geo. F. Soull.

Various parties in interest have decided it to be imperative that a material sum of money to cover the expenses of counsel acting in the interest of all defendants be subscribed.

GENERAL FILM CO.

NEW YORK.

-2-

THE SOULL FUND

11 subscribers at \$250.00 each		\$2,750.00
Paid to April 1st	\$1,565.60	
Bill rendered April 1st	370.75	
	<u>1,936.35</u>	
Available balance		<u>813.65</u>

GENERAL FUND FOR ATTORNEYS' FEES AND OTHER PURPOSES

Fund to pay for counsel, 6 subscriptions at \$500 each - \$3,000

Subscribers are the following: General Film Company,
Kalam Company, Vitagraph Company, Selig Polyscope
Company, Essanay Manufacturing Company and George Kleine.

Mr. Samuels has recommended to Pathe that they subscribe
an equal amount.

While individual and general counsel having these treble
damage suits in hand, have labored industriously on these cases, it
seems necessary that there be intensified co-operation among the
defendants. The decision in the first case will establish a precedent
of the utmost importance. While the plaintiffs may have selected it
because of its assumed strength, there are several points involved
which may, in fact, turn the selection of this plaintiff for the
opening trial to the advantage of the defendants.

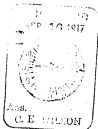
Several subscribers who have been interviewed in the
matter have suggested an additional appropriation of \$2,500 from each
defendant, that there be a working fund which will adequately take
care of legal fees.

Mr. Allen has submitted bills for his services amounting
to about \$3,000, which have not yet been passed upon.

Judge Moon asks as general counsel a fee of \$5,000, which
is not in full for services in this cause.

One subscriber suggests the engaging of counsel of national
reputation with special knowledge of the Sherman Law, and has submitted
four names known to all of the defendants. It may be too late to engage
such counsel, but inquiries will be made immediately and the results
submitted.

The writer has been asked to take up this matter of sub-
scriptions. Will you kindly address him at #63 East Adams Street,
Chicago, from Monday, April 16th, to Tuesday, April 24th. Letters
mailed on the Twentieth Century at 2:45 on any day will be delivered
in Chicago the next morning at about 11 o'clock.



GENERAL FILM CO.

NEW YORK.

-3-

It is necessary that all defendants be warned that lethargy at this stage may lead to disastrous consequences.

Manufacturers who have correspondence or other matter in the files covering transactions with the Chicago Film Exchange, and if such matter has not yet been taken up with Mr. Scull, are asked to communicate with him immediately.

Very truly yours,

GK/SG.



C. J. Wilson

Mr. Wilson:—

At your request and for the information of Mr. Edison and yourself, I summarize below a number of matters concerning which I have advised you from time to time recently.

Damage Suits

The appeal in the Government Anti-Trust suit against the Patents Company and the Edison Company was originally set for hearing by the Supreme Court on April 9th, and on the strength of this the Courts here had postponed the trial of the triple damage suits until May. The Department of Justice was not ready to argue the case on April 9th, however, and the appeal was set over to October 2nd. The Courts here have refused to hold up the trial of the damage suits until after the Supreme Court can pass on the Government case and has set the first of these suits for trial on May 14th, 1917. That suit is one brought by the Chicago Film Exchange, a concern not licensed by the Patents Company, but one with which the Edison Company and a number of the other licensees were dealing up to the time the Patents Company was formed. At that time all of these companies, including the Edison Company, stopped dealing with that exchange, and it now claims that it was damaged by being deprived of its source of supply. Its claim, which of course is highly padded, is for \$1,400,000. which it asks to have tripled.

In these suits the Edison Company is represented by Mr. McCarter and I have been spending considerable time with him personally, and in fact, all of my time on this case, because

C.H.W.

C / LMB - 4/24/17

all of the defendants are looking to me to prepare the facts for presentation. At the end of an interview yesterday with Mr. McCarter, he agreed that he and I would, on May 1st, 1917, bury ourselves here in New York at some place where we could have the necessary papers to work with, but where no one would know where we were so that we could devote the two weeks before the trial to concentrated preparation. You will, of course, appreciate that this first case is the test case, and in fact, because we have no Supreme Court decision, we are in the position to raise the same defenses in this suit as we did in the Government case and have them tried out precisely as if there never had been a Government case. While the judges here in New York will be respectful toward the decision of Judge Dickinson in Philadelphia, we are confident that they will not be influenced by it.

Last Tuesday there was a conference of all the counsel representing the different defendants in the triple damage suits, and it was expressly agreed that Mr. McCarter should cross-examine the witnesses and make the opening address to the jury and it was evident that it was also desired that he should at least assist in the summing up. There will be no difficulty, therefore, in my opinion, in having our plan of Mr. McCarter virtually being the counsel in charge of the case, accepted by the other counsel, such other counsel, however, aiding in the work.

I have repeatedly told Mr. McCarter that the Edison Company wishes him to defend these suits precisely as if it were the only defendant, and that he were the only counsel in the case

C.H.W.

GFS/LMB - 4/24/17

so that there could be no question of dividing his responsibility.

Personally I have laid aside all of my other work and am concentrating also on this damage suit, for I do not know of anything of sufficient importance which cannot be deferred until after the trial of this first case.

---ooOoo---

Latham Patent

The recent decision of the Supreme Court on the suit by the Patents Company against the Universal Company on the Latham patent has the effect of determining finally that we cannot enforce the restrictions on the patent plates on the projecting machines sold under the Patents Company's license. In order to arrive at this conclusion, the Supreme Court flatly overruled its own decision in the Dick case which we had been following in our contracts.

The validity of the Latham patent has not been disturbed in any way nor passed on by the Court, and the patent is therefore as good today as ever. It expires in August, 1919.

Some time since we started a suit against a dealer in Philadelphia based on the sale of a Power machine, this suit being to test the validity of the patent.

In view of the decision of the Supreme Court and the short term of the patent, it is my belief that the Patents Company should now reach some definite understanding with the machine manufacturers by which they would all pay a royalty. It seems to me that almost anything we can get out of the patent should be accepted. The Nicholas Power Company at the time it

C.H.W.

C.H.W./LMB - 4/24/17

stopped paying its royalties, asserted that it would continue to pay, if we would revise the license agreement so as not to compel it to do the thing which the Supreme Court now says we cannot enforce. But in the meantime back royalties amounting possibly to \$15,000. or \$20,000. have accrued, and it is doubtful whether they would now come in and pay the back royalties rather than take a chance and fight.

The Patents Company is getting a small revenue from one machine of the manufacturers which is just about sufficient to pay the operating expenses, but not enough to pay the lawyers' fees which have accumulated in connection with this litigation over the Lathem patent, and its share of the defense of the damage suits.

It is desirable for the present, however, to keep the Patents Company in some sort of position where its papers can be readily accessible because its records are and will be in constant use in the preparation and defense of the damage suits.

I am of the opinion that it will be best to leave the Patents Company situation as it is until after the outcome of the damage suit is determined, and then if there is a pause between the trial of the first and second of such suits, take up seriously the matter of the future policy as to the Patents Company.

George F. Bell

GEORGE F. SUGGS
SINGER BUILDING, 140 BROADWAY
NEW YORK CITY
PATENTS AND PATENT CAUSES

*John
Dickinson
Suggs*

May 4th, 1917.

Delos Holden, Esq.,
Thomas A. Edison, Inc.,
Orange, N.J.

My dear Holden:--

You will recall that some time back you suggested a scheme by which the Edison Company could be protected in the event of an adverse judgment in the coming damage suit. I think it is highly desirable for you to commence to lay plans and have the necessary arrangements made to carry out such a scheme because, while we are hopeful of the suit, it is not by any means a certainty that we will not have a heavy judgment against us.

The situation of the case is about like this: Judge Mayer has said that if the plaintiffs use the Government decree and obtain a judgment, then he will stay the collection of the judgment under some sort of conditions at present undetermined so that, in the event Dickinson's decree is reversed in the Supreme Court, we will get a new trial as a matter of right. Then too, because of the number of involved questions, which will come up, it is highly probable that we could, by giving a supersedeas bond, stay the collection of the judgment.

But you will note that either of these would probably involve the giving of a bond because while a levy might be made on real estate and become a lien on the property pending the appeal, most of the assets of the various defendants is in personal property, and of course, no such lien is possible.

I think, therefore, that you should also be prepared to arrange for the giving of a bond. Under the circumstances of the case, this will probably have to be a joint bond for the entire judgment because obviously the plaintiffs would not accept a separate bond for any portion from any one of the defendants. Inasmuch as the Edison Company is probably the most obviously solvent one of all of the defendants, the largest portion of the burden of showing assets to support such a bond will probably fall on the Edison Company.

I am writing this, not by way of making any suggestions,

Delos Holden, Esq.

-2-

5/4/17

but merely to advise you of the situation so that you can act
in the interests of the Edison Company as you think best.

Yours very truly,

George F. Skull

GFS/LMB

*1 copy of this
OK'd by
Mr. Edison on 5/14/17
+ delivered by me
to Mr. Mambert.*

May 17, 1917.

Robert H. McCarter, Esq.,
Prudential Building,
Newark, N. J.

Dear Mr. McCarter:

I understand that an agreement has been reached for the settlement of the suit of Chicago Film Exchange vs. Motion Picture Patents Co. et al and the companion suits in which the plaintiffs are represented by the same attorney as in the suit mentioned, as discussed at our recent conference, and that the amount to be paid by Thomas A. Edison, Inc. is \$100,000. ^{*on behalf of one of Mr. Edison's interests*} I hand you herewith checks drawn to your order for this amount to be used for this purpose.

Mr. Edison relies entirely upon you to protect the interests of Thomas A. Edison, Inc., Motion Picture Patents Co. and Edison Manufacturing Co. in this settlement and to secure from the plaintiffs such instruments of release or otherwise as may be necessary for such protection.

Kindly acknowledge receipt and oblige,

Yours very truly,

General Counsel.

ENCLS.
DH/JU

Box 63

June 11, 1917

George F. Scull, Esq.,
149 Broadway,
New York, N. Y.

Dear Mr. Scull:-

Mr. Wilson would like to have you write up a sort of resume, telling what was done in the recent settlement of certain treble damage suits, including a list of the suits settled and the amount paid by us and each of the other defendants in each of the suits. Also, please tell what happened in the Sampliner suit.

Mr. Wilson would also like to have a list of any other such suits that are pending and a statement of your views as to the likelihood of there being other suits.

Will you kindly send a couple of extra copies so that we may have one for this department and one to turn over to Mr. Edison.

Yours very truly,

HL-JS.

GEORGE F. SCULL
SINGER BUILDING, 149 BROADWAY
NEW YORK CITY
PATENTS AND PATENT CAUSES

June 13, 1917.

(Personal)

Henry Lanahan, Esq.,
Legal Dept.,
Thomas A. Edison, Inc.,
Orange, N. J.

My dear Mr. Lanahan:

I have yours of the 11th inst., and enclose
three copies of memorandum which I think covers what Mr.
Wilson has in mind.

Yours very truly,

George F. Scull

3 encls.

2 copies sent to Mr. Wilson 6/14/17

HC

[ENCLOSURE]

Re: Settlements of Damage Suits

The following damage suits have been settled and releases (except Miles Bros.) obtained from the plaintiff corporations, and from the individuals connected with them:

Chicago Film Exchange

George Melies

Eugene Cline

Samuel Schiller

U. S. Film Exchange

Standard Film Exchange

Colorado Film Exchange

Theatre Film Service of San Francisco

Imperial Film Exchange (Truesdale, Receiver*)

Miles Bros.

Globe Film Service

Royal Film Service

In the case of Miles Bros., the settlement has been effected, but because Miles Bros. went into bankruptcy some years ago, it was deemed unsafe to deal directly with them. Consequently, both sides have agreed to the settlement and the releases and money will be exchanged when it is determined to whom the money shall be paid, the money in the meantime being placed in the hands of ex-Judge McCall, as trustee.

By separate agreement, about 1/6 of the settlement in each case was also placed in the hands of ex-Judge McCall to be paid to the plaintiffs at the end of November 1917, provided they have in the meantime stirred up no more litigation, or become interested in no similar litigation.

[ENCLOSURE]

In the case of Globe Film Service and the Royal Film Service, settlement was made directly with the plaintiff for the lump sum of \$2500. for both cases. The attorney has a lien of 50% of the recovery, and we reserved enough from the total settlement to pay this lien.

The total settlement amounted to \$325,000. Of this Edison contributed \$100,000., Biograph \$50,000., and Vitagraph, Pathe, Kleine, Selig, Essanay, Kalem and General Film \$25,000. each.

The above is the list as given out, but I have reason to believe that the General Film share was made up by possibly three or more of the others, and I have also reason to believe that Selig's share was advanced by Kleine and Spoor.

In the only other remaining suit, that of Sampliner, after negotiations to settle on any reasonable basis had fallen through, we went to trial last week on the single issue as to whether or not Sampliner, who is a lawyer, in buying the claim had been guilty of champerty, so that he could not maintain a suit. After trial, lasting one day, the Judge directed a verdict for the defendants and dismissed the complaint. There may be an appeal from this, but it cannot be heard until next fall in any event.

The foregoing accounts for all of the suits brought and settled. There is a possibility, but hardly a probability of two or three more suits being brought, as there are some people who have as good a cause of action as those with whom we have settled, but there are various reasons which lead me to believe that such suits are hardly likely. One chief reason is that I believe that Cockran & Manton combed the

[ENCLOSURE]

I

I

country pretty well for possible cases, and if their canvass did not succeed in stirring up litigation, it is hardly likely that anything else will. In any event, any suits brought from this time on will have the greater part of the alleged damage barred by the Statute of Limitations.

George F. Scull

June 13, 1917

Livingston Office
Hedges Bull
Hedges Bull
Hedges Bull
Hedges Bull
Hedges Bull
Hedges Bull
Hedges Bull
Hedges Bull
Hedges Bull

Washington Life Building
Hedges Bull

RECEIVED BY

Hedges Bull
Counselors at Law



OK of Edison Co

New York, January 21, 1919.

only to pay

\$500.00
Delos Holden, Esq.,
C/o Thomas A. Edison, Inc.
Legal Department,
Orange, N. J.

Re - Twentieth Century Optiscope Case

My dear Holden:-

The above case, as you know, was filed many months ago, the defendants being the same as in all of the other previous triple damage suits. Service was had on a number of the defendants long ago, but, for some reason, the plaintiff did not attempt to serve any of the Edison defendants.

Mr. Dyer has sent me a copy of the complaint which has just been served on him and I presume that you will wish me to look after this case the same as I did the others.

Plaintiff's attorney has, as you will also recall, been attempting to settle this case and I talked to Kingsley again this morning about it. It seems that plaintiff's attorney is willing to settle for \$5000.00 which is really more than the case is worth so far as its merits are concerned, but probably less than it would cost us to prepare for trial, let alone actually try the case. I think it is likely that he will be willing to allow each of the corporations, together with the individuals, in whom such corporation is interested, to buy peace at \$500.00 each, and personally I think that it will be advisable

Delos Holden, Esq.....2.....Jan. 21, 1919.

for the Edison Company to do this. There are farther conversations to be had and possibly this price can be cut some.

Will you please advise me what you wish me to do and also whether or not you agree with me as to the foregoing proposed terms of settlement.

Yours very truly,

George F. Hull

GFS*G

Box 63

January 22, 1919

George F. Scull, Esq.,
141 Broadway,
New York, N. Y.

20th CENTURY OPTISCOPE COMPANY

Dear Scull:

Replying to your favor of the 21st instant. We should be pleased to have you look after this case on our behalf.

If you are able to settle the case as regards the Edison interests, and such individual defendants as were connected with the Edison interests, at a total cost of \$500., you are hereby authorized to do so.

Very truly yours,

General Counsel.

DH-EH

Princeton, N.J.
Edgar Bull
C. B. Huggins
Wood Bull
Washington
D. C. Wood

Washington, D.C. Building
411 Broadway

Gifford & Bull,
Counsellors at Law.

New York, March 18, 1919.

Henry Lanahan, Esq.,
Legal Department,
Orange, N. J.

Re - Sampliner vs. Patents Company et al.

My dear Mr. Lanahan: -

I have yours of the 17th instant, and am enclosing
two copies of a memorandum prepared in accordance with your
request.

Yours truly,

Edgar Bull

GFS/A

Enclosure.



[ENCLOSURE]

March 18, 1919.

C. H. W. H. H. H.

Mr. Charles Edison:

This memorandum is being written you at the request of Mr. Lanahan. Sometime since I told Mr. Lanahan that all of the triple damage suits, except the Twentieth Century Optiscope, had been disposed of. At that time the suit of Sampliner for triple damages had been tried in the District Court here in New York, and had resulted in a verdict for defendants on a special defense which they had set up, to the effect that Sampliner, an attorney-at-law, could not buy up and prosecute a speculative suit of this character.

This verdict had been appealed to the Court of Appeals here, and the decision of the lower court affirmed.

At the time that I talked to Mr. Lanahan it had been assumed, apparently without justification, that the case would go no further. Last week papers in an appeal to the Supreme Court of the United States were served by the plaintiff, so that that appeal will have to be met when it arises. There is no reason to believe that the Supreme Court will advance the hearing so that it probably will not be reached for more than a year.

Personally, I have great confidence in our defense, which has already been approved by two courts. The situation is so outrageous, that a court is inclined to find in defendants favor if it possibly can. The evidence shows that Sampliner, an attorney at Cleveland who had done some work for the Lake Shore Film Exchange, took the claim of that Exchange against the licensed manufacturers under the Sherman Act, in payment for services valued at not more than \$5,000.

[ENCLOSURE]

Mr. Charles Edison

-2-

Mar. 18, 1919.

He then brought suit in Ohio against the General Film Company only for \$101,000, and subsequently brought suit in the Southern District of New York for \$250,000. The defense also showed that at the time he took the claim there had been no attempt to ascertain the amount of alleged damage which had been done to the Exchange.

Both courts found that this was a highly speculative litigation, and one which the law does not permit an attorney to engage in.

It is my personal opinion, that this appeal has been filed in the desperate attempt to get the defendants to pay something so as to avoid further expense in connection with the appeal. The decisions of both the lower courts have been so strongly in favor of the defendants, that it appears that Sampling, or rather his attorneys, are making a desperate attempt in this appeal.

George S. Soull.

Box 63
March 19, 1919

Mr. Charles Edison:-

In my memorandum of March 4th to Mr. Thomas A. Edison, prepared at your request, I stated that all of the triple damage suits had been settled up except the Twentieth Century Optiscope Company case, this being based on information received from Mr. Soull.

Last week we were advised by Mr. Soull that he had been served with a notice of appeal to the United States Supreme Court in the case of Sampliner vs. Motion Picture Patents Company, Thomas A. Edison, Inc., Frank L. Dyer et al. I have asked Mr. Soull to write a brief statement concerning this case, and I am forwarding the same to you herewith and presume that you will hand it to your father.

Henry Lanshan

Sampliner

Box 63

December 21, 1920

Mr. Thomas A. Edison,

You will perhaps remember that there is still pending one of the Triple Damage Suits brought against various defendants including Motion Picture Patents Company, Thomas A. Edison, Incorporated, and other motion picture manufacturers, for an alleged violation of the Sherman Anti-Trust Act. This is the suit brought by Joseph H. Sampliner. In this case one of the defenses was that the acts by which Sampliner obtained his rights as plaintiff constituted champerty, and that the suit could not, therefore, be maintained. The case was tried upon this single issue, and after the plaintiff had put in his case, the defendants moved for a directed verdict and the attorney for the plaintiff also moved for the direction of a verdict in his favor. The Court thereupon seems to have made a finding of fact and directed a verdict for the defendants. The case was appealed to the Circuit Court of Appeals who sustained the decision of the lower Court and an appeal was thereupon taken to the U.S. Supreme Court. A decision has just been rendered reversing these decisions, and I hand you herewith a copy of the opinion of the Supreme Court. As I understand the opinion, the question relates to a technical point of procedure, and apparently means that the trial Judge should not have passed upon a question of fact, but should have permitted it to go to the jury. The case has been remanded for further proceedings. This means that a new trial is ordered, and the

parties are in precisely the same position as when they started, that is, the same defenses are open to us as before and the question of champerty can be tried out before a jury.

Your interests in this litigation are in the hands of Mr. Robert McCarter, Mr. Scull informs me that he and Mr. McCarter and Mr. Seabury, who represents other defendants, are to have a conference this week to decide upon further procedure.

Delos Holden

Enc.
DH-23

I

Bsp 63

~~Charles~~

February 15, 1921

Mr. Charles Edison:

Referring to the annexed letter from Mr. Soull. You will note that the defendants in the Sampliner suit, which include Motion Picture Patents Company and Thomas A. Edison, Inc., are liable for costs on the appeal to the Supreme Court amounting to approximately \$775.00. Fortunately, Mr. Soull has already collected \$250.00 each out of some of the other defendants and now asks authority to contribute one-fifth of the costs on behalf of the Edison Company up to \$250.00.

This arrangement ^{it} seems to me is fair, and if you will approve I will give Mr. Soull this authority.

As a matter of fact, the entire amount could be collected by the plaintiff from any one of the defendants, so that it is to our advantage to have the amount divided up.

Delos Holden

Enc.
DH-23

Holden - I will
approve this as
Charles is sick
T A Edison

*Livingston Gifford,
Edgar Bull,
C. D. Chapman,
Wm. H. Bull,
W. H. Bullock,
D. L. Wood.*

*Livingston Gifford Building,
11 Broadway.*



ID 627

New York, March 3, 1921.

Delos Holden, Esq.,
Thomas A. Edison, Inc.,
Orange, N. J.

My dear Holden:

Re - Sampliner v. Edison et al.

I enclose copy of a letter received this morning from William Seabury. I know nothing more than what is stated in the letter. I have been trying to reach Mr. McCarter today, but find that he is in Trenton where he will be tomorrow also, and that he has a case on in Newark on Saturday. It is possible that he will be in his office tonight about five o'clock and I have left word to have him call me up then. I should have liked to have arranged a conference with Mr. McCarter and yourself. Unfortunately all of my evenings of this week are taken up and Monday and Tuesday of next week I shall probably be in Philadelphia. I really do not believe, however, that the offer made by the plaintiff is likely to be withdrawn.

I am dropping a letter to William Seabury stating that both Mr. McCarter and myself are tied up and possibly will not be able to give him an answer until some time next week.

In the meantime, will you think the matter over and possibly discuss it with the Edison people to ascertain their attitude.

Delos Holden, Esq.

-2-

March 3, 1921. ID 627

ID 627

I am sending a copy of Seabury's letter to Mr.
McCarter.

Yours very truly,

George F. Bull

GFB:c
Enc.

[ENCLOSURE]

Id 627

WILLIAM MARSTON SEABURY
120 Broadway,
New York

March 2, 1921.

Dear Mr. Scull:-

Judge Seabury had a long conference today with Mr. Cannon of Cleveland, one of Sampliner's counsel, and Mr. Gustavus A. Rogers, at which a possible settlement of the Sampliner case was discussed.

As a final offer of settlement Mr. Cannon and Mr. Rogers offered, subject to withdrawal without notice, to accept \$30,000 and costs which we understand not to exceed \$1,000.

I have telegraphed Mr. A. B. Smith, President of Vitagraph, who is at present in Los Angeles, and have told him that if five defendants are prepared to contribute equally to this settlement, I am prepared to recommend its acceptance.

Will you please advise me immediately how you feel about it and whether your client will be one of five to contribute equally to this settlement.

Mr. Cannon is returning to Cleveland on Friday of this week and says he would like an answer before he goes.

Sincerely yours,

Wm. Seabury

George F. Scull, Esq.,
141 Broadway,
New York City, N. Y.

WMS-L

Charles

ID 627

March 9, 1921

What is your opinion
E

Mr. Thomas A. Edison:

I annex hereto a letter dated March 2, 1921 from William Seabury to Mr. Scull. Mr. Seabury is attorney for the Vitagraph Company.

I had a conference this morning with Mr. Robert McCarter and Mr. Scull, in order to obtain their views and recommendation as to whether or not we should agree to the proposed settlement.

The decision of the Supreme Court in this suit means that the defense of champerty, which by stipulation between counsel can be tried separately from the main issues of the suit, is a question which should go to the jury, that is, it should be left to the jury to decide whether or not Sampliner acquired the claim upon which he has brought suit with the intention or for the purpose of bringing suit, or whether he acquired it in a bona fide manner in payment for services previously rendered to his client. If it is decided to go ahead with the suit, the case will practically be in Mr. McCarter's hands as the other defendants have intimated that they would be glad to have him represent all of the defendants. He, however, stated that inasmuch as he is a New Jersey lawyer he would like to have New York counsel associated with him, which means that Judge Seabury would also be in the case. The latter is a heavy charger and Mr. Scull thinks would charge \$2000 for defending the case, and that it could hardly be expected that Mr. McCarter would charge less since he would be the active trial

counsel, and the other expenses might be estimated at \$1000, making a total of \$5000. This apparently would be the cost of trying out the case on the champerty defense alone, to be followed by another trial on the merits if the defendants were unsuccessful. Mr. Soull feels quite positive that we should win on the champerty defense, and thinks Mr. McCarter feels that way also. I stated that I did not feel like accepting the responsibility of deciding whether or not we should endeavor to settle but would present the matter to you and asked what recommendation Mr. McCarter would make. He replied that if you were sitting there in his office and he were talking to you in person he would say that if you feel like being a sport and taking a chance he would advise you to defend the suit because he did not feel that even if it should go against you, the judgment could be much if any more than the amount at which they offer to settle, that is, \$30,000. He also said that if it was a question of principle with you, not to be held up by what he considers virtually a black-mailing proposition and you feel that it is a case of millions for defense but not one cent for tribute, then he would also advise you to fight the case. On the other hand, the easiest way out of it, that is, the line of least resistance, if you have no feeling in the matter, would be to settle at the amount named, your share of which, that is, one-fifth, would be \$6000, plus costs not to exceed \$200.

Mr. Soull stated that when the case was on before and was either being tried or about to be tried, the plaintiff offered to settle for \$15,000, and we might endeavor to beat them down

from \$30,000 to possibly \$20,000 now, but even if this were done it would save the Edison Company only \$2000 and we would have to pay Mr. McCarter for his services in carrying on such negotiations and also prepare for trial if we turn down the proposition for settlement which is now before us because the plaintiff might refuse to accept any smaller amount.

Will you, therefore, please indicate what you would like to have us do as regards this offer of settlement. I might add that in case a judgment should be entered in this suit it is probable that it could be divided up among various defendants under an agreement to contribute. Inasmuch as the suit is in the Southern District of New York and we have practically no assets in that District it is likely that the plaintiff if it became necessary to enforce the judgment by execution, would proceed against some of the other defendants, but we would pay our share under that agreement.

Delos Holden
~~et al.~~

Enc.
DH-ES

[ATTACHMENT]

Father -

I figure it that
A jury can only vote two
ways - for or against
and that, as they are
usually ~~more influenced by~~
more influenced by
whim & caprice than
justice, the laws of
chance operate rather
than the laws of reason
in arriving at their decision.

In other words I
never figure a corporations
chances before a jury
as ^{theoretically} more than 50:50
no matter what the facts are.

The Sampson case has
pertered us for years

It would cost us at least
\$1000 ($\frac{1}{2}$ of legal charges of
the suit in Champerty)
to save 5000 and
we've only got an
even money chance to
save it.

If we loose Lord
knows how much
more time & money
it will cost us to
go on & fight and
then in the end

[ATTACHMENT]

we might lose.

The pots too small
and the odds are
not long enough
in our favor to
arouse much enthusiasm
on my part to play
out the hand.

I'm for sitting even
tho the other fellows
may be a crook.

[ATTACHMENT]

Golden
Charles Opinion
is mine, settle
so we limit our
loss to \$6000-
But less if possible
T A Edison

**Legal Department Records
Motion Pictures - Case Files**

United States of America v. Motion Picture Patents Company et al.

This folder contains material pertaining to an antitrust suit brought by the federal government against the Motion Picture Patents Co. The case was initiated in 1912 in the U.S. District Court for the Eastern District of Pennsylvania. It was subsequently appealed to the U.S. Supreme Court. The selected items include the government's original petition; testimony by Frank L. Dyer at hearings held in New York City in November 1913; and memoranda from 1915 briefing Edison on the progress and settlement of the suit.

Legal Box 10

Marked
Copy

No.

In the District Court of the United States for the
Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, PETITIONER,

v.

MOTION PICTURE PATENTS COMPANY AND OTHERS,
DEFENDANTS

ORIGINAL PETITION

JOHN C. SWARTLEY,
United States Attorney.

GEORGE W. WICKERSHAM,
Attorney General.

JAMES A. FOWLER,
Assistant to the Attorney General.

EDWIN P. GROSVENOR,
Special Assistant to the Attorney General.

RECEIVED

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REPRINT

In the District Court of the United States for the
Eastern District of Pennsylvania.

THE UNITED STATES OF AMERICA, PETITIONER,
v.
MOTION PICTURE PATENTS COMPANY AND
others, defendants. } No. —

Original Petition.

To the honorable judges of the District Court of the United
States for the Eastern District of Pennsylvania, sitting in
equity:

The United States of America, by John C. Swartley, its
attorney for the eastern district of Pennsylvania, acting under
the direction of the Attorney General, brings this proceeding
in equity against Motion Picture Patents Company, General
Film Company, Biograph Company, Thomas A. Edison
(Inc.), Essanay Film Manufacturing Company, the Kalem
Company (Inc.), George Kleine, Lubin Manufacturing Com-
pany, Melles Manufacturing Company, Pathé Frères, the Selig
Polyscope Company, the Vitagraph Company of America,
Armat Moving Picture Company, Frank L. Dyer, Henry N.
Marvin, J. J. Kennedy, William ~~Pelzer~~, Samuel Long, J. A.
Borst, Siegmund Lubin, ~~Upton~~ Melles, Albert E. Smith,
George K. Spoor, and W. N. Selig.

The defendants above-named, engaged in interstate and
foreign commerce in motion pictures, films, cameras, exhibit-
ing machines and other articles and apparatus used in the
motion picture art, are violating the provisions of the act of

Edison Mfg Co was a party

Congress passed July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and this proceeding is instituted to prevent and restrain the hereinafter particularly described agreements, contracts, combinations, and conspiracies in restraint of, and restraints upon, interstate and foreign trade in such articles, the attempts to monopolize and the contracts, combinations, and conspiracies to monopolize, and the existing monopolizations of part of trade and commerce among the several States in such commodities.

On information and belief, your petitioner alleges and shows:

I.

Motion Picture Patents Company is a corporation organized under the laws of New Jersey, with its principal offices at 80 Fifth Avenue, New York City.

General Film Company is a corporation organized under the laws of the State of Maine, with its principal offices at 200 Fifth Avenue, New York City.

Thomas A. Edison (Inc.) is a New Jersey corporation, the successor to all the rights and privileges of the Edison Manufacturing Company, also a New Jersey corporation. The principal offices of Thomas A. Edison (Inc.) are located at Orange, N. J.

Biograph Company is a corporation organized under the laws of New Jersey, with its principal offices in New York City.

Essanay Film Manufacturing Company is a corporation organized under the laws of the State of Illinois, with its principal offices at Chicago, Ill.

Kalem Company (Inc.) is a corporation organized under the laws of the State of New York, with its principal offices at New York.

Lubin Manufacturing Company is a corporation organized under the laws of the State of Pennsylvania, with its principal offices at Philadelphia.

Melies Manufacturing Company is a corporation organized under the laws of the State of New York, with its principal offices at New York City.

Pathé Frères is a corporation organized under the laws of the State of New Jersey, with its principal offices at New York City.

Selig Polyscope Company is a corporation organized under the laws of the State of Illinois, with its principal offices at Chicago.

Vitagraph Company of America is a corporation organized under the laws of the State of New York, with its principal offices at Brooklyn, New York.

Armat Moving Picture Company is a corporation organized under the laws of West Virginia, with offices in the city of Washington, D. C.

Said defendants will be hereinafter referred to as "corporation defendants" and "defendants."

The individuals made defendants herein and hereinafter called "individual defendants" and "defendants" have been and now are officers and directors of the corporation defendants as hereinafter stated, and as such officers and directors have participated and do now participate in the management and direction of the business of the corporation defendants, and have been and are now responsible therefor.

Frank L. Dyer has been since its organization president and a director of Motion Picture Patents Company and a director of General Film Company since the incorporation of the latter company. He is president of Thomas A. Edison (Inc.) and was president or vice president of its predecessor, Edison Manufacturing Company, during the period hereinafter mentioned.

Henry N. Marvin has been since its organization and is now vice president and a director of Motion Picture Patents Company. He is vice president of the Biograph Company, and held that office during the period hereinafter mentioned.

J. J. Kennedy has been since its organization and is now treasurer and a director of Motion Picture Patents Company, and president and a director of the General Film Company since the incorporation of the latter company. He is also president of the Biograph Company and held that office during the period hereinafter mentioned.

William Pelzer has been for several years, and is now, secretary and a director of the Motion Picture Patents Company, and secretary of the General Film Company since the incorporation of the latter company. He is also an officer of Thomas A. Edison (Inc.) and held that office during the period hereinafter mentioned.

Samuel Long is now and has been since its incorporation treasurer and a director of the General Film Company. He is president and a director of Kalem Company and held that office during the period hereinafter mentioned.

J. A. Berst is now, and has been since its incorporation, a director of the General Film Company. He is one of the officers of and interested in Pathé Frères and held that office during the period hereinafter mentioned.

Stigmund Lubin is now, and has been since its incorporation, a director of the General Film Company, and he is president and a director of the Lubin Manufacturing Company and held that office during the period hereinafter mentioned.

Albert E. Smith is now, and has been since its incorporation, a director of the General Film Company. He is president and a director of Vitagraph Company of America and held that office during the period hereinafter mentioned.

George K. Spoor is now, and has been since its incorporation, a director of the General Film Company. He is president and a director of Essanay Film Manufacturing Company and held that office during the period hereinafter mentioned.

W. N. Selig is now, and has been since its incorporation, a director of the General Film Company, and he is president, a director, and stockholder of the Selig Polyscope Company, and held that office during the period hereinafter mentioned.

George Kleine is an individual residing in Chicago, Ill., doing business in his own name. He has been vice president and a director of General Film Company since its incorporation.

Gaston Melies is now, and has been since its incorporation, a director of the General Film Company, and he is also president of Melies Manufacturing Company, having held that office since its incorporation.

II.

The object of this suit is to remove the restraints which defendants herein have imposed upon trade and commerce in machines, apparatuses, and apparatuses relating to the motion-picture art and upon persons engaged in such trade and commerce.

A moving picture or a picture of an object in motion in reality consists of a long series of consecutive snap shots; or instantaneous pictures, taken one after the other of the object the movement of which it is desired to portray. These pictures are recorded at such brief intervals, 16 per second, that in any two consecutive pictures there is no perceptible change in the position of the object which is in motion. The result is that when the series of pictures is thrown rapidly upon a screen by means of a projecting machine the illusion of movement is produced. The eye in

reality looks upon a swift succession of instantaneous photographs but is deceived into believing that it is seeing actual movement.

Persons engaged in trade and commerce in these appliances may be divided into three classes: (1) Manufacturers of moving picture cameras, films, and projecting or exhibiting machines; (2) rental exchanges doing a wholesale or jobbing business in distributing these machines and films to the exhibitors; (3) exhibitors of pictures or theatre owners.

With the development of the motion-picture business in the last 20 years, numerous patents relating to the motion-picture art have been issued by the United States. Some of these patents have related to the mechanism of moving picture cameras or have been patents for improvements in said mechanism; many patents have been issued relating to projecting or exhibiting machines and many more for improvements in said machines. Some of these patents have been sustained by the courts while some have been held invalid either by reason of their infringing other patents or because they related to matters not properly patentable.

Many important factors, besides the character of the camera and projector, enter into the production of a good motion picture. The quality and composition of the sensitized, translucent strip of celluloid film used in the camera, known as the negative film; the perforating of the negative film with mathematical precision before it is placed in the camera and exposed; the developing of the negative, the developing and printing of the positive film from the negative are all important elements to the perfection of which years of constant experimenting and unremitting research have been devoted.

Of all commerce relating to the motion-picture art the commerce in positive motion-picture films is by far the most considerable. Between two and one-half and three million feet of pictures are printed every week by the manufacturers and

distributed to thousands of exhibitors all over the United States. The patrons of these theatres generally demand a daily change of the entire picture program, and therefore it is essential to every exhibitor that the source of supply of pictures be at all times open and unrestrained.

Within the last ten years the moving-picture business has reached enormous proportions. It is probably true that a sum greatly in excess of \$100,000,000 has been invested in the different branches of the business.

In the year 1908 and prior thereto there were ten manufacturers or importers of moving pictures in the United States; that is to say, there were that number of companies which were producing or importing reels of motion pictures and selling and shipping them to exchanges scattered throughout the United States, the latter in turn distributing to exhibitors all over the country. There were at that time some 125 to 150 rental exchanges, and 6,000 or more exhibitors in the United States.

In this commerce in positive films or moving pictures, the manufacturers at that time competed with each other for the business of the exchanges, and all the exchanges competed for the business of the exhibitor. There were also a number of manufacturers of cameras and of projecting machines competing with each other.

The ten manufacturers of films and their respective places of business from which they sold and shipped as aforesaid were the following:

American Mutoscope and Biograph Company, New York City, a New Jersey corporation, now known as the Biograph Company.

Edison Manufacturing Company, Orange, N. J., a New Jersey corporation, predecessor of Thomas A. Edison (Inc.).
Essanay Film Manufacturing Company, Chicago, an Illinois corporation.

Kalem Company, New York City, a New York corporation.

George Kleine, Chicago, a large importer of films, representing nine foreign companies.

Lubin Manufacturing Company, Philadelphia, Pa., a Pennsylvania corporation.

George Moltes Manufacturing Company, Chicago, Ill., an Illinois corporation, an important importer of foreign films, and also a producer of American films.

Pathé Frères, New York City (factory, Bound Brook, N. J.), a New Jersey corporation, an importer of films and an important producer of domestic films.

Selig Polyscope Company, Chicago, an Illinois corporation.

Vitagraph Company of America, Brooklyn, N. Y., a New York corporation.

All these producers of positive moving-picture films were engaged in shipping and distributing their films throughout the United States to the rental exchanges of which, as stated above, there were between 125 and 150 in the country. These rental exchanges, in turn, distributed the films to the thousands of exhibitors, and in so doing were engaged in interstate commerce, as practically every rental exchange had many customers located in other States than the State in which the rental exchange was situated.

At the time mentioned, and prior thereto, keen competition existed in the motion-picture business and commerce relating thereto. A theater owner or exhibitor was able to buy a projecting machine from the Biograph Company, the Armat Company or other manufacturers, and exhibit thereon the moving pictures of any manufacturer. He could buy foreign films imported by said Kleine or George Moltes Company, or American films from any one, or from all of the manufacturers of films above named. Interstate and foreign

commerce in films, moving picture cameras, projectors and other appliances relating to the art was unrestrained by any combination of manufacturers. At that time films were not leased but sold by the manufacturers to the rental exchanges. The latter in turn leased but did not sell them to the exhibitors.

III.

MOTION PICTURE PATENTS COMPANY.

In the year 1908 the defendants determined to destroy competition between them, to monopolize commerce relating to the motion-picture art, to exclude all others, and thereafter to carry on said commerce according to the terms of the unlawful combination which they were to create. Briefly stated, the combination was to take the following form: Defendants were to organize a company which should do no business and hold no property other than certain letters patent which were to be transferred to it by the defendants and others. This company was to acquire all patents owned by defendants and all other patents relating to the motion-picture art.

Each of the 10 manufacturers was to take from this new Patents Company a license to produce and lease motion pictures. These license agreements were to be all alike and their terms were to be arrived at by agreement of all defendants before the patents were assigned by them to the new company. In the license agreements were to be incorporated conditions and restrictions not authorized by the patent laws and regulating the conduct of the business of the manufacturers in every detail. Under these agreements they were all to do business in exactly the same manner. They were to lease films and no longer sell them; they were to lease at uniform and noncompetitive prices and only to such rental exchanges as should obtain a license from the

new Patents Company and should agree to handle only defendants' films and to sublease only to exhibitors licensed by the Patents Company. No exhibitor was to be furnished films who did not agree not to display films of any manufacturer other than defendants and not to use projecting machines not licensed by the Patents Company. Defendants intended by virtue of these agreements to acquire the power to determine who should engage in business as a producer of films and who should be excluded from that business, who should continue to operate a rental exchange and whose rental-exchange business should be destroyed, who should remain an exhibitor and who should close his theater, who should in the future open a new motion-picture theater and who should be barred from so doing. The intent of defendants in forming the new company and in entering into the license agreements was to control, restrain, and monopolize all branches of commerce among the States of the United States and with foreign nations relating to the motion-picture art, and to exclude others therefrom.

Accordingly, with the unlawful purposes just mentioned, the defendants, acting together, incorporated under the laws of New Jersey, September 8, 1908, Motion Picture Patents Company (hereinafter called the "Patents Company"), with a capital stock of \$100,000.

The articles of incorporation declare the purposes of Motion Picture Patents Company as follows:

The objects for which this corporation is formed are to acquire by purchase, lease, payment of royalties or otherwise, letters patent, inventions and improvements in materials, processes and apparatus relating to the production of negatives and positives for motion pictures, and also relating to the photographing, developing, reproducing, projecting, and exhibiting of scenes and objects at rest and in motion;

to mortgage, sell, lease, dispose of by agreement or otherwise, such letters patent, licenses under letters patent, and improvements, and to license others to use the inventions covered by the said letters patent and to use such improvements; to purchase, hold, sell and convey such real and personal property as shall be lawful and adapted to the requirements of the business of the company.

The certificate of incorporation of the Motion Picture Patents Company, hereinafter called the Patents Company, is attached hereto as a part of this petition marked Exhibit 1.

On December 18, 1908, at a meeting in New York City attended by all the individual defendants, and all the corporation defendants being represented except the Melies Manufacturing Co., defendants, with the unlawful purposes above mentioned, executed (a) preliminary agreements for the assignment of the patents to the Patents Company, and (b) nine license agreements with the Patents Company, one being concluded by each of the manufacturers (except Melies Co., which signed a similar agreement on a later day) with the Patents Company. The terms of all these agreements had been arranged beforehand at numerous conferences between the manufacturers.

On the same day, according to their previous agreement, defendants elected the following officers and directors of the Patents Company:

President, Frank L. Dyer, also vice president of Edison Manufacturing Company.

Vice president, H. N. Marvin, also vice president of Biograph Company.

Treasurer, J. J. Kennedy, also president of Biograph Company.

Secretary, George T. Scull, an attorney of the Edison Manufacturing Company.

These officers have at all times since its incorporation constituted the entire board of directors of the Patents Company, except that William Pelzer, an officer of Thomas A. Edison (Inc.), has been for some time past and is now secretary and director in place of George F. Scull.

All of the stock of the Patents Company, except the four qualifying shares held by the four directors, has been owned ever since its organization, one-half by the Edison Manufacturing Company and its successor, Thomas A. Edison (Inc.), and the other half by the Biograph Company, as provided in the preliminary agreements for the assignment of the patents to be next described.

IV.

Preliminary Agreements for the Assignment of the Patents.

There were four of these agreements, all executed as above stated, December 18, 1908, each agreement being entered into by one of the following companies with the Patents Company:

1. Edison Manufacturing Company,
2. Biograph Company,
3. Armat Moving Picture Machine Company, and
4. Vitagraph Company of America.

These agreements are identical as to all the essential features. A copy of the Edison agreement, dated December 18, 1908, is attached hereto as a part of this petition and marked Exhibit 2.

After reciting that the Edison Company owns Reissues Letters Patent Nos. 12037 and 12102 and that the Edison Company desires to acquire \$50,000 of the \$100,000 authorized capital stock of the Patents Company, in consideration of the assignment of the patents last named, and after further reciting that the Patents Company has acquired or

will acquire certain patents (naming them) from the Vitagraph Company of America, Biograph Company, and the Armat Company, and that the Patents Company contemplates deriving royalties of three kinds (1) from manufacturers of projecting machines licensed under the patents by the Patents Company (machine royalties), (2) from exhibitors, for the use of projecting machines licensed under the patents by the Patents Company (exhibitors' royalties), and (3) from manufacturers and importers of motion-picture films licensed under Reissues 12037 and 12102 above named (film royalties), the Edison preliminary agreement provides:

(1) The Edison Company agrees to assign reissue patents 12037 and 12102 and the right to sue for past infringement, and the Patents Company agrees to issue 500 shares of stock aggregating \$50,000. (Paragraphs 9 and 10.)

(2) The Edison Company agrees not to pledge, sell, or dispose of its capital stock in the Patents Company, and to deposit its certificates with a trust company, to be named by the Patents Company, as trustee, and to instruct the said trustee not to release, transfer, or return the said certificates so deposited without the consent of the Biograph and Armat Companies. (Paragraph 14.)

(3) After deducting from the machine royalties a royalty of \$1 a machine, to be paid the Vitagraph Company, and after deducting from the gross exhibitors' royalties 24 per cent for payment to the licensed manufacturers and importers of motion pictures other than the Biograph and Edison Companies, and after deducting the expenses, the balance is to be divided as follows:

(a) To the Edison Company shall be assigned and paid an amount equal to the net film royalties.

(b) The remainder up to an amount equal to the net film royalties, shall be assigned and paid to the Biograph Company and the Armat Company, respectively, in the proportion

Payments of moneys collected by Edison Co. will still be distributed though not as dividends to Thos. A. Edison Inc. even though the stock be put back in Edison Mfg. Co. since as if Edison Inc. & Mfg. Co. could be joined as joint tortfeasors and that profits of former could be subjected to execution if collection of these moneys is deemed illegal

of two-thirds to the Biograph Company and one-third to the Armat Company.

(c) If any balance remains after the foregoing payments, it shall be divided and paid to the Edison Company, the Biograph Company, and the Armat Company in the proportion of one-half to the Edison Company, one-third to the Biograph Company, and one-sixth to the Armat Company. (Paragraph 12.)

(4) Provision is made for the continuation of the agreement beyond August, 1914, the date of the expiration of the patents which the Edison Company assigns, for it is provided that on August 18, 1915, one year after the expiration of the patents, and at the end of each year thereafter, the Patents Company shall pay to the trustee who holds its certificates of stock all of its net profits for the preceding year, consisting of net machine royalties, net exhibitors' royalties, and "the net sum of any royalties which the Patents Company may collect in lieu of the present film royalties" as a dividend upon the capital stock of the Patents Company, and will instruct the trustee to divide the said dividends and to pay to the Edison Company therefrom an amount equal to one-half of such dividend. (Paragraph 13.)

(5) The agreement may be terminated—

(a) For wilful and continued breach of its terms by either of the parties.

(b) If the Patents Company becomes bankrupt or ceases doing business.

(c) If the Patents Company is dissolved voluntarily or otherwise.

(d) If its charter is repealed.

Upon termination of the agreement for any of the foregoing causes, all the right in Patents 12037 and 12192 shall be reassigned to the Edison Company by the Patents Company. (Paragraph 15.)

The preliminary agreement of the Biograph Company with the Patents Company is identical with that executed by the Edison Company, except that it provides for the assignment of different patents, and also provides that the Biograph Company shall retain the right (without the payment of any royalty to the Patents Company), to practice the inventions described in the patents which it assigns. This agreement, like the Edison agreement, stipulates that upon its termination the Patents Company shall reassign the patents to the Biograph Company.

The Armat agreement is similar except that the Armat Company receives no stock in the Patents Company as a consideration for the transfer of its patents. Like the others it contains a provision for a continuance of the arrangement beyond 1914, and for a reassignment of the patents by the Patents Company to the Armat Company if the agreement is terminated for any of the reasons above stated.

In the Vitagraph agreement the Vitagraph Company agrees to assign six patents and the right to sue for past infringement, but it reserves the right to practice the inventions described in said patents without the payment of any royalty to the Patents Company. The Patents Company agrees that it will not grant any license to manufacture exhibiting or projecting machines under any patents owned by it and covering such machines unless such licensee shall also accept a license to manufacture and sell exhibiting and projecting machines under the Vitagraph patents whether or not such licensee may thereafter make use of any of the inventions covered by said Vitagraph patents. The Patents Company agrees to pay a royalty of \$1 on each machine containing the inventions described in one or more of the Vitagraph patents, a royalty of \$1 when the machine is capable of exhibiting by transmitted light, and a royalty on other kinds of machines.

It is provided that the agreement shall continue until the expiration of all the Vitagraph patents. Upon the termination of the agreement for any of the causes named, the Patents Company shall reassign the patents to the Vitagraph Company.

V.

The Manufacturers' License Agreements Entered Into With the Motion Picture Patents Company.

On the same day, December 18, 1908, with the unlawful purposes above mentioned, each of the ten manufacturers named on pages 7-8, *supra* (except the Melles Company, whose president joined later and formed another company), hereinafter called Patents Company, licensees, concluded with the Motion Picture Patents Company a license agreement, each license being practically identical with every other license. The terms of these license agreements had been determined at numerous earlier conferences between defendants. Each agreement regulated in every detail the manner in which the manufacturer should do business, which was to be the same for all the manufacturers. Each agreement licensed the manufacturer to manufacture and use moving-picture camera embodying the inventions of the patents and to "manufacture, print, and produce positive motion pictures embodying the inventions of said reassigned Letters Patent No. 12192 and to lease the same in the United States * * *". These agreements were licenses under the camera and film patents and are to be distinguished from the licenses to the manufacturers of exhibiting machines to be later described.

A copy of the license agreement dated December 18, 1908, between the Motion Picture Patents Company and the American Mutoscope & Biograph Company, now named the Biograph Company, is attached hereto as a part of this petition, marked "Exhibit 3." This agreement, substan-

tially identical with the eight other license agreements executed the same day, provides, in brief:

1. The licensee—that is, the manufacturer of the motion-picture film—is licensed to lease the film only on condition that it be used in exhibiting or projecting machines licensed by the licensor.

2. The licensee agrees that he will use exclusively sensitized film manufactured by a manufacturer authorized by the licensor, and that he will buy all his film from that manufacturer. (Sec. 4.) This refers to the Eastman Kodak Company.

3. The licensor agrees that he will obligate such manufacturer not to sell sensitized film to anyone but the licensee, except a small per cent, which may be supplied by the manufacturer to persons who do not make motion pictures of the standard size. (Sec. 4.)

4. The licensee agrees to pay certain royalties on the film to the licensor. (Sec. 4.) This amounts to approximately half a cent per foot, subject to reductions in proportion to sales. These royalties are called the "film royalties."

5. The Patents Company agrees to collect royalties of \$2 a week from all exhibitors using motion-picture projecting machines embodying the inventions described in the letters patent which were to be assigned to the Patents Company. (Sec. 4.) This provision is to apply regardless of the fact that those machines had already been sold with no condition attached and had become the property of the exhibitor. The royalty was to be paid on all machines already on the market. These are called the "exhibitors' royalties."

6. The licensee agrees not to sell any motion-picture film, but only to lease or rent the same to licensed exchanges and in accordance with the terms of the exchange license agreement hereafter described. This was a radical departure from

the trade custom; previously manufacturers had sold films outright and had not leased them.

7. The licensee agrees not to lease or dispose of motion pictures to anyone dealing in motion pictures which are not the output of one of the licensees. (Sec. 6.)

8. The licensee agrees to mark conspicuously on labels which shall be placed on all boxes containing positive motion pictures the conditions under which the motion pictures are leased, among others that (a) the lessee, i. e., the rental exchange, shall not sell but shall only have the right to sublet such motion picture; (b) the lessee shall permit such motion pictures to be exhibited only on motion picture projecting machines licensed by the Motion Picture Patents Company and on no other machines; (c) the lessee shall not sublet such motion picture at a lower subrental price than that agreed upon (if any) in the contract of lease between the lessee and lessor; (d) a violation of any of the conditions shall entitle the lessor, i. e., the manufacturer, to immediate possession of the motion picture. (Sec. 7.)

9. The agreement fixes a scale of minimum prices for the lease of positive pictures by the manufacturers to the rental exchanges, and also provides:

The licensor and licensee further mutually covenant and agree that the above scale of minimum prices is to remain in force until a new scale of prices is adopted, each such new scale to be adopted during the continuance of this agreement by a majority vote, to be forthwith communicated to the licensor, of the licensee and the several additional licensees hereinafter provided for, or such of them as may at the time be licensees, on the basis of one vote for each 1,000 running feet of new subjects. (Sec. 9.)

10. The licensee agrees not to lease motion pictures either directly or indirectly at lower prices than those fixed and provided for in the agreement. (Sec. 13.)

11. It is agreed that the subleasing prices for the subleasing of pictures shall be fixed by a majority vote of the licensees. (Sec. 17.)

12. The licensee agrees not to dispose of positive motion pictures except by lease, as above described, or by sale for export only, and also to refrain from supplying motion pictures for use with any exhibiting or projecting machine, the license for which has been terminated by the licensor, and also to refrain from supplying motion pictures to any lessee who may sublet such motion pictures to persons using the same for giving exhibitions thereof on exhibiting machines not licensed by the licensor or the licensee for which has been terminated. (Sec. 18.)

13. The parties agree that no person other than the nine hereinbefore referred to shall obtain a license except by a majority vote of the licensees, on the basis of one vote for each thousand running feet of new subjects. (Sec. 20.)

14. The licensor agrees that it will issue licenses to make and sell exhibiting or projecting machines containing the inventions described in the letters patent assigned, but that it will not license any person except upon the condition that the sale and purchase of such machine gives only the right to use it solely for exhibiting motion pictures leased by a licensee of the licensor. (Sec. 20.)

15. The licensor agrees to charge a royalty of \$5.00 on every such machine. These are called the "machine royalties."

16. The licensor agrees to license the licensee to make and sell exhibiting machines. (Sec. 20.)

17. It is provided that the licensee may renew this agreement by giving notice to the licensor before April 20, of each year until August, 1919, the date of the expiration of the Letters Patent 707934, known as the Latham "loop" patent. (Sec. 21.) This is a patent relating to part of the mechanism of the camera and projector.

As previously stated, the Patents Company entered into substantially the same agreement with each of the nine manufacturers. George Kleine, one of the nine, but an importer and not a manufacturer, was licensed to import positive films, but the amount he was allowed to import was limited to 3,000 running feet of new subjects per week, and he agreed to confine his purchases to two foreign manufacturers, Gaumont and Urban. Prior to this license arrangement Kleine had imported the films of nine or ten foreign manufacturers and amounts largely in excess of 3,000 feet per week.

A few months later the Patents Company, by agreement of the nine manufacturers, voting as provided in paragraph 13 *supra* (section 20 of the license agreement) licensed defendants Gaston and George Melies to import not to exceed 1,000 feet of new subjects per week made in France by George Melies. Said two individual defendants are now doing business in the name of the Melies Manufacturing Co., corporation defendant, which company has the benefit of the license granted Messrs. Melies.

VI.

The Rental Exchange Agreements.

As stated above (*supra* p. 17, par. 6) the manufacturers' license agreement requires the manufacturer to lease film to rental exchanges in accordance with the terms of an exchange license agreement. In other words, the manufacturers, on December 18, 1908, adopted, and thereafter used, a uniform contract in the distribution of films to the rental exchanges. No company would thereafter lease or consign films to any rental exchange which had not signed one of these so-called license agreements with the Patents Company; furthermore, every rental exchange was not afforded

an opportunity to enter into such an agreement, for the defendants, acting through the Patents Company, refused licenses to a large number of the rental exchanges. Most of these were driven out of business. To about one hundred of the rental exchanges the Patents Company granted licenses. Under the terms of these agreements the Patents Company reserves the right to terminate the license at any time without cause on fourteen days notice by it, and to cancel the agreement at once on breach of any of its terms by the rental exchange. After such termination of an agreement the exchange can not obtain films from any of the licensed manufacturers. These agreements destroyed all competition between the rental exchanges for they prescribed the manner in which the exchange should do business, which was made the same for all exchanges. Thereafter the defendants, acting through the Patents Company, prevented the exchanges from competing with each other for the business of the exhibitors by prohibiting any two exchanges from serving the same exhibitor.

A copy of the exchange license agreement between the Patents Company and the rental exchange is attached hereto as a part of this petition, marked "Exhibit 4."

After enumerating the patents owned by the Patents Company, and reciting that the Patents Company has licensed nine manufacturers, naming them, to manufacture or import motion pictures, and to lease licensed motion pictures for use on projecting machines licensed by the licensor, the Motion Picture Patents Company, licenses the rental exchange under released Letters Patent 12192, the film patent, to lease licensed motion pictures from the licensed manufacturers and importers, and to sublet said licensed motion pictures for use only on projecting machines licensed by the licensor under letters patent owned by it.

The licensee, i. e., the rental exchange, agrees as follows:

(1) Not to buy, lease, or otherwise obtain any motion pictures other than licensed motion pictures, and to dispose of motion pictures only by subleasing under the conditions set forth in the contract. (Condition 1.)

(2) The ownership of each licensed motion picture is to remain in the licensed manufacturer. (Condition 2.)

(3) The licensee shall not sell or exhibit licensed motion pictures, but shall only sublet the same, and only to exhibitors who shall exclusively exhibit licensed motion pictures. (Condition 3.)

(4) The licensee shall not sell, rent, or otherwise dispose of any licensed motion pictures to any person engaged in selling or renting motion picture films. (Condition 6.)

(5) The licensee shall not sell or dispose of motion pictures to any person in the exhibition business who may have violated any of the conditions imposed by the licensor through any of its licensees and of which violation the licensee may have had notice. (Condition 10.)

(6) The licensee shall not sublet licensed motion pictures to any exhibitor unless a contract with said exhibitor satisfactory in form to the licensor, i. e., the Patents Company, is first executed, and unless each motion picture projecting machine on which the licensed motion pictures are to be used by such exhibitor is regularly licensed by the Motion Picture Patents Company and the license fees therefor have been paid. (Conditions 11 and 12.) The license fee is \$2 a week on every projector owned by the exhibitor.

(7) The licensee or rental exchange is required to mail to the Patents Company a list, giving the name of each exhibitor supplied with pictures by the rental exchange. (Condition 12.) The rental exchanges thereafter were not allowed to supply the same exhibitors; the latter were apportioned among the licensed exchanges. This paragraph (No. 12) in effect prevents the rental exchanges from subleasing pictures

to a new exhibitor until that exhibitor has received the approval of the Patents Company; by it the latter company is enabled to determine who shall become an exhibitor.

(8) The licensor agrees that before licensing any person in the United States to lease licensed motion pictures from licensed manufacturers, i. e., to be a rental exchange, it will exact from each such licensee an agreement similar in terms to the present agreement. (Condition 16.)

(9) The licensor may terminate the agreement on fourteen days' written notice to the licensee of its intention so to do, or immediately upon breach of any of its conditions. (Condition 19.)

(10) The terms and conditions of the license may be changed at the option of the licensor upon fourteen days' written notice to the licensee. (Condition 20.)

(11) The licensee shall return to each licensed manufacturer on the first day of every month, commencing seven months from the first day of the month on which the agreement is executed, an amount of positive motion picture film in running feet equivalent to that obtained the seven preceding months. (Condition 8.)

(12) The leasing prices are stated in the agreement. (Condition 20.) *These become the same for every rental exchange in the United States.*

The effect of these rental exchange agreements was to place all the rental exchanges at the mercy of defendants and the Patents Company. This company would not allow exhibitors to lease from different exchanges, but required each exhibitor to obtain his entire supply of films from one exchange. In this respect competition between rental exchanges was eliminated. Each rental exchange paid the same for his films as every other exchange. To-day each of the ten Patents Company, licensees, leases its films at the same prices and on the same terms as the other nine licensees.

VII.

Licensed Exhibitors.

After January 1, 1900, the defendants commenced to do business in accordance with the terms of the unlawful combination which they had formed and in which they are now engaged, and thereafter not one of the thousands of theater owners or exhibitors in the United States could obtain for exhibition purposes a motion picture manufactured by any of the ten manufacturers, comprising all the manufacturers and importers at that time doing business in the United States, unless the Patent Company recognized him and gave his name as a licensed exhibitor to the licensed exchanges. In order to secure a license, the exhibitor has to obligate himself to use upon his machines only pictures manufactured by the licensed manufacturers. The exhibitor has to pay on every exhibiting machine owned by him \$2 a week to the Patents Company; this so-called exhibitor's royalty applies to machines sold years before to the exhibitor without any conditions being attached to the sale. No two exchanges are permitted to serve the same exhibitor during the same period. Branch by a rental exchange or by an exhibitor of any of the conditions imposed by the defendants through the Patents Company subjects such rental exchange or exhibitor to an immediate cancellation of his license. The power and monopoly of the defendants became absolute. Defendants, through the Patents Company, were enabled to and did determine whether new motion picture theatres should or should not be opened and whether old ones should be closed, although defendants had no proprietary interest in such theaters. This power defendants have exercised and continue to exercise arbitrarily and unreasonably through the Patents Company. Whenever the Patents Company cancels the license of a rental exchange it sends notice thereof to all the

customers of such exchange, and likewise when it cancels the license of an exhibitor notice is sent to the rental exchanges. Thereafter neither such rental exchange nor exhibitor can obtain anywhere in the United States the product of any of the ten manufacturers defendants herein.

All the oppressive restrictions and unlawful conditions contained in the agreements and pointed out in the preceding paragraphs of this petition, and to be noted in the paragraphs to follow, defendants have observed and enforced at all times since they engaged in their unlawful combination, and they will continue to enforce said unreasonable and oppressive restraints and conditions unless restrained by this honorable court.

VIII.

License Agreements With Manufacturers of Exhibiting Machines.

Defendants on December 18, 1900, not only by means of the Patents Company and the so-called license agreements bound together all manufacturers of moving-picture cameras and films into one combination, but also with the same unlawful purpose, and as a further means to monopolize trade, devised license agreements between the Patents Company and each manufacturer of projecting or exhibiting machines. The license agreements of December 18, 1900, recite that the parties are intending to conclude other agreements relating to projecting machines. (Supra, p. 19.) The agreements between the Patents Company and projecting machine manufacturers contain many of the restrictive provisions incorporated in the license agreements under the camera and film patents referred to above. (Supra, pp. 16 to 19.) Among other things, these agreements provide that every exhibiting machine shall be sold subject to the condition that it shall be used solely for exhibiting motion pictures containing the

invention of the reissued patent 12192; that is to say, every machine is to be sold subject to the condition that it shall be used only with films supplied by one of the ten licensed manufacturers.

These agreements also fix the prices at which all projecting machines are to be sold; these prices are made the same for all—that is to say, all competition in interstate commerce between the various manufacturers of projecting machines as to the prices and terms of sale of their respective machines is destroyed by establishing uniform prices. The agreements provide that the manufacturer shall pay the Patents Company a royalty of \$5 on every machine, called "machine royalties."

The Patents Company, acting under the direction and domination and in the interest of defendants, early in 1909 concluded license agreements of the character indicated with all the companies at that time manufacturing and selling projecting machines in the United States, to wit:

American Mutoscope and Biograph Co., Apr. 20, 1909.

American Moving Picture Machine Company, Feb. 18, 1909.

Armat Moving Picture Co., Jan. 7, 1909.

Edengraff Mfg. Co., Jan. 7, 1909.

Edison Mfg. Co., Jan. 7, 1909.

Enterprise Optical Mfg. Co., Jan. 7, 1909.

Lubin Mfg. Co., Jan. 7, 1909.

Nicholas Power, Jan. 7, 1909.

Eberhard Schneider, Jan. 7, 1909.

Selig Polyscope Co., Jan. 7, 1909.

Spoor & Co., Jan. 7, 1909.

Vitagraph Co. of America, Jan. 7, 1909.

The companies just named, located in different States, were selling and shipping projecting and exhibiting machines in interstate commerce throughout the United States.

A copy of the license agreement under the exhibiting-machine patents between the Motion Picture Patents Company and the Armat Moving Picture Company is attached hereto as a part of this petition marked "Exhibit 5." This agreement is similar to those issued to the other companies named above.

IX.

General Film Company.

As has been pointed out above (supra, p. 6), persons engaged in the motion-picture business belong to one of three classes: (1) Manufacturers of cameras, films, and other appliances relating to the motion-picture art, and distributors of these articles to the rental exchanges; (2) rental exchanges or wholesale distributors, constituting the source of supply of the exhibitor; (3) exhibitors of moving pictures. By means of the Motion Picture Patents Company and the agreements above described, defendants restrained the commerce of the manufacturers and dominated and controlled the business of the rental exchanges and exhibitors. On or about April, 1910, defendants set out to monopolize the business of all the rental exchanges in the United States, their purpose being to drive out of business all persons so engaged and to absorb to themselves the profits theretofore made therein. This unlawful end they accomplished in the manner to be presently described by means of a corporation organized by them for that purpose, General Film Company, corporation defendant.

In April, 1910, defendants, with an intent to monopolize the rental exchange business, organized the General Film Company, a Maine corporation, capital stock \$2,000,000, reduced March, 1911, to \$1,000,000, preferred \$800,000, common \$200,000, common stock alone having voting rights

and all being owned by defendants. Each of the incorporators was connected with and interested in the business of one of the ten Patents Company, licensees.

The following were at once elected officers and directors, each officer and director being an officer of and largely interested in the business of one of the ten manufacturers:

President, J. J. Kennedy, president of the Biograph Company, and treasurer and director of the Motion Picture Patents Company since its organization.

Vice president, George Kleine, owning the business of George Kleine, hereinabove referred to.

Treasurer, Samuel Long, president of the Kalem Company.

Secretary, William Pelzer, also secretary of the Motion Picture Patents Company, and an officer of the Edison Manufacturing Company.

The following were elected directors:

Frank L. Dyer, president of the Motion Picture Patents Company and vice president of the Edison Manufacturing Company.

J. A. Berst, vice president of Pathé Frères.

J. J. Kennedy, president of the Biograph Company and treasurer of the Patents Company.

Siegmund Lubin, president of the Lubin Manufacturing Company.

Samuel Long, president of the Kalem Company.

Gaston Melies, president of Melies Manufacturing Company.

Albert E. Smith, president of Vitagraph Company of America.

George K. Spoor, president of Essanay Film Manufacturing Company.

W. N. Selig, president of the Selig Polyscope Company.

George Kleine, one of the ten licensed manufacturers.

Each one of the ten Patents Company, licensees, was represented by one director on the board of the General Film Company, and only representatives of those companies were elected to that board.

The articles of incorporation of the General Film Company recite among its purposes the following:

For the purpose of buying, selling, or otherwise acquiring or disposing of letters patent and licenses under letters patent for inventions pertaining to the production and use of photographic or other negatives, and photographic or other positives of objects at rest and objects in motion; manufacturing, buying, using, selling, or otherwise acquiring or disposing of apparatus, materials, etc., equipping theatres, halls, and similar places of amusement * * *

A copy of the charter of General Film Company is attached hereto as a part of this petition, marked "Exhibit 6."

Before the organization of the General Film Company defendants, who were to be its officers and directors, had determined the amount of money the new company should expend in order to acquire, by purchase, by driving out of business, by cancellation of licenses by the Patents Company, or by other appropriate methods, all the licensed rental exchanges, to wit, \$2,480,000 cash and \$988,800 in preferred stock in the new company. Something less than that amount defendants in fact expended before January, 1912, in bringing to a successful conclusion the unlawful plan which they had set out to accomplish.

As has been pointed out previously (supra, 23), defendants, through the Patents Company, had incorporated in the license agreements with the rental exchanges a provision authorizing the Patents Company to terminate the agreement at any time upon two weeks' notice, and immediately

upon breach of any of its terms. This provision defendants after the formation of the General Film Company proceeded at once to invoke. Between April, 1910, and January 1, 1913, defendants, through the General Film Company, acquired the business or cancelled the license of every licensed rental exchange in the United States, except one, paying therefor \$2,243,059 in cash and notes and \$794,800 in preferred stock. During this period the General Film Company purchased 57 exchanges, paying therefor the sum just stated. Since its organization the Patents Company has cancelled the licenses of and driven out of business 42 exchanges, of which 21 were cancelled after the General Film Company commenced business. The result of the conspiracy of defendants is that to-day, of all the exchanges doing business in the United States December 18, 1908, only one, the Greater New York Film Company, survives. The latter company refused to sell out, whereupon the defendants, through the Patents Company, cancelled its license, but under the protection of a decree issued by the United States District Court in New York against defendants it is still able to obtain the films of defendants.

The General Film Company was incorporated by defendants solely as an unlawful instrumentality to effect the illegal purposes of defendants, and in order that it, in cooperation with the Motion Picture Patents Company, might drive out of business and interstate and foreign commerce in the United States all rental exchanges and absorb their businesses and profits and thereby enable the defendants to further monopolize commerce relating to the motion-picture art. The General Film Company became on its incorporation and has ever since been a combination in restraint of trade and commerce between the States and a monopolization thereof.

X.

Agreement Between Motion Picture Patents Company and General Film Company.

Motion Picture Patents Company and General Film Company, acting under the direction and domination of the individual and other corporation defendants, with the unlawful purposes hereinabove described, entered into an agreement April 21, 1910, unlawfully and unreasonably restraining the interstate trade of the General Film Company and of the 10 manufacturers, to the execution of which agreement each of the 10 Patents Company licensees assented in writing on the same day. A copy of that agreement, dated April 21, 1910, is attached to this petition as a part hereof, marked Exhibit 7. Defendants have observed and carried out said agreement since its execution and they are now conducting their several businesses in accordance with and in conformity to the unlawful terms and conditions established by said agreement. In brief, the agreement, Exhibit 7, provides:

(1) The Patents Company grants to the General Film Company in the United States a license to have positive motion pictures manufactured for it by the Patents Company licensees, and to purchase positive motion pictures manufactured in foreign countries, and to lease such positive motion pictures provided they are leased subject to the condition that they be used solely in exhibiting or projecting machines containing the inventions or some of them of the letters patent owned by the Patents Company. (Par. 6.)

(2) The licensee agrees that all positive motion pictures manufactured for it during the continuance of the agreement shall be manufactured only by the Patents Company, licensees. (Paragraph 8.) This paragraph prevents the General Film Company from purchasing, leasing, or selling or otherwise dealing in positive motion pictures except those

manufactured for it by the Patents Company, licensees, without the consent in writing of the licensor.

(3) The Film Company agrees to pay a royalty to the licensor on all motion pictures purchased by it at the maximum rate of one-half cent per running foot. (Paragraph 9.) This royalty is subject to reduction if the amount purchased is over 4,000,000 running feet. If it runs as high as 10,000,000 feet, the royalty is reduced to $3\frac{1}{4}$ mills per running foot. (Paragraph 10.)

(4) The Film Company agrees not to lease, sell, or otherwise dispose of motion pictures to anyone purchasing, using, dealing in, etc., motion pictures which are not the output of the General Film Company or of other licensees of the Patents Company. (Paragraph 12.)

(5) The Film Company agrees that no lease of positive motion pictures manufactured for or purchased by the licensee shall be made in the United States except upon certain conditions which are practically the same as those which were stated in the rental exchange agreement executed between the Patents Company and the rental exchanges (supra, pp. 19 to 22) (paragraph 14), to wit:

1. The lessee (that is, the exhibitor) shall not dispose of the pictures, but shall only have the right to use them in machines licensed by the Patents Company under patents owned or thereafter acquired by the Patents Company.

2. The lessee shall not sublet the motion pictures.

3. The licensee, that is, the Film Company, shall on the first day of every month withdraw from the market an amount of positive motion pictures equal to the amount of such motion pictures leased by it during the seventh month preceding the date of each such withdrawal.

4. The violation of any of these conditions entitles the lessor (General Film Company) to immediate possession of such motion pictures.

(6) The Film Company agrees that it will dispose of motion pictures manufactured for or purchased by it only by sale for export or by lease to motion-picture exhibitors in the United States for the purpose only of using such motion pictures for giving exhibitions in exhibiting machines licensed by the Patents Company under patents named or thereafter acquired (paragraph 15); that it will not use the pictures for the purpose of giving exhibitions thereof for profit; that it will not knowingly allow motion pictures manufactured for or purchased by it to be used with any exhibiting machines not licensed by the licensor, under patents owned by it or thereafter acquired; that it will refrain from supplying motion pictures for use with any exhibiting machines the license for which has been terminated and the Film Company notified thereof by the licensor; that it will refrain from supplying motion pictures to any lessor who may loan or sublease such motion pictures, or who may use such pictures for giving exhibitions thereof in exhibiting machines not licensed by the licensor or the license for which has been terminated (paragraph 15).

(7) It is provided that the agreement may be renewed yearly, until August 26, 1919, the date of expiration of Patent 707034, known as the Latham "Loop" Patent. (Paragraph 18.)

The agreement last described was consented to by each of the 10 Patents Company licensees, each of whom affixed its consent thereto in writing, such consent being given "with the understanding that said General Film Company is not to have under said limited license in writing any voting rights or royalty-sharing rights such as those referred to in said agreement of the undersigned, with said Motion Picture Patents Company."

XI.

Agreements Between the General Film Company and Patents Company Licensees.

On April 21, 1910, with the same unlawful purposes each of the 10 Patents Company licensees executed an agreement with the General Film Company to supply the latter with film to be leased to exhibitors. These agreements are identical with each other except as to the paragraph stating the number of running feet of film which the General Film Company agrees to take.

Defendants by agreement with each other executed these agreements as another means for accomplishing their unlawful purpose to monopolize the motion-picture art and all interstate and foreign business, trade, and commerce relating thereto. Defendants have observed and are now observing said agreements and all the terms thereof, and interstate and foreign trade and commerce in articles necessary in the motion-picture art are being restrained thereby.

A copy of the agreement between the General Film Company and Edison Manufacturing Company, dated April 21, 1910, is attached hereto as a part hereof, marked "Exhibit 8." Said agreement, substantially identical with nine other agreements concluded the same day with the other Patents Company licensees, after reciting the interlocking restrictions contained in the other agreements, provides in brief:

(1) The manufacturer (Edison Company) agrees to supply the General Film Company with as many copies of each licensed motion picture released by the manufacturer as the General Film Company may require for the conduct of its business and to supply them at the same leasing prices, terms, etc., as it leases them to others. (Paragraph 6.)

(2) The General Film Company agrees that it will lease from the manufacturer motion pictures and will use its best efforts to introduce them and extend their use by motion-

picture exhibitors using the licensed projecting machines. (Paragraph 7.)

(3) The Film Company agrees to pay the manufacturer a share of its net profits at the end of each year during the continuance of the agreement, after it has paid 7 per cent dividend on its preferred stock and 12 per cent dividend on the common stock. The manufacturer is to have such a proportion of the net profits remaining after the deduction of the dividends as the number of running feet of pictures leased by the manufacturer to the Film Company bears to the total amount of running feet leased by the Film Company from all the Patents Company licensees during that year. (Paragraph 8.)

(4) The agreement shall continue until August 26, 1919, the date of the expiration of the Latham "loop" patent, No. 707,334. (Paragraph 12.)

The agreement states the minimum number of reels which the General Film Company agrees to take, as well as the maximum which it may be obliged to receive.

XII.

Conclusion.

Throughout the period of time mentioned in this petition and in all their actions described herein, defendants have been actuated by the purpose to monopolize all branches of interstate and foreign commerce relating to the motion-picture art and to exclude all others therefrom.

As a means to that end, they organized the Motion Picture Patents Company, a New Jersey corporation. To it they transferred patents competing with each other and patents not competing, patents valuable and patents of little if any worth.

Not satisfied with the benefit of the lawful monopolies and rights belonging to them under the several letters patent which they separately and independently of each other

owned, defendants coveted the unlawful power which would come to them if they combined all patents in one ownership; that is, if they created and thereafter possessed and maintained a monopoly of all patents relating to the motion-picture art. Defendants formed a combination of patents as one of the methods for monopolizing interstate and foreign commerce pertaining to the motion-picture art.

The Motion Picture Patents Company is an unlawful instrumentality operated and maintained by defendants solely for the purpose of carrying into effect their unlawful intent. The Patents Company has never owned any property except the patents transferred to it by defendants and which, upon its dissolution, it must reassign, without consideration, to the several defendants who owned and transferred them to the Patents Company. (Supra, pp. 14 to 16.). Other than collecting royalties from defendants and distributing such royalties among them in the manner prescribed by the agreements, its only business has been and is the bringing of lawsuits under the patents which it acquired from defendants. Acting under the direction of the other defendants, in order to compel observance by rental exchanges, exhibitors, and all other persons of the unlawful restraints embodied in the agreements, and in order to harass and oppress all persons engaged in the motion-picture business who have not obeyed its mandates, it has brought hundreds of suits in the courts of law against rental exchanges, exhibitors, and others. Defendants have used their power, great by virtue of their combination, unreasonably and oppressively in order to further extend their monopoly and exclude others from the motion-picture art.

Defendants devised the interlocking restrictions, described above, applying to the use of their several machines, appliances, and apparatus as a method to perpetuate their monopoly. Not one of these restrictions is a legal and reason-

able condition attached to the use of a patented machine by the owner of the patent acting singly and in good faith in order to protect his lawful monopoly, but each condition is one and a part of a combination of conditions and restrictions devised by a combination of all the defendants, all the conditions applying collectively to and interlocking the use of all the machines. These restrictions and unlawful restraints dovetail into each other in such a manner that the manufacturer, the rental exchange, and the exhibitor must use all or none of the machines covered by the different patents. He can use no others.

With the object of concealing their true purposes and the real character of the combination, defendants devised, adopted, and enforced the so-called license agreements, attempting to give to their actions a lawful appearance and to the combination a legal form. In the agreements they embodied unlawful restraints upon commerce, styled by defendants qualifications upon the use of patented machines, but in fact unreasonable, undue, and oppressive restraints arbitrarily imposed by them upon commerce in articles not patented.

As previously pointed out, by far the largest and most important part of the commerce relating to the motion-picture art is the commerce in positive films, of which millions of running feet are distributed each week throughout the United States and subsequently displayed by thousands of exhibitors throughout the country. The combination of defendants was devised to restrain that commerce. Such positive films are not patented. Reissued Letters Patent 23192 (attached hereto is a part hereof, marked "Exhibit 9"), made by defendants the basic patent of their combination, relates only to the negative film. The positive film, (which is sometimes copyrighted by the producer), is the product of the negative, being developed and printed from

the latter. The dominion of the patentee does not include control over the product of the patented article unless new in a patentable sense. Therefore, whether or not Reissued Letters Patent 12192 is a valid patent, as to which grave doubt must exist in view of the decision of the Circuit Court of Appeals of the Second Circuit, March 10, 1902, holding invalid the patent of which 12192 is in part a reissue and stating that the owner of the prior patent was not the inventor of the film (114 Fed., 934), in any event, defendants have no lawful right under the patent laws to destroy competition in commerce and restrain commerce in the unpatented positive film.

Defendants, by means of the license agreements, have prevented and are preventing the importation of foreign films except to a limited extent by defendant Kline and corporation defendant, Meiss Manufacturing Company, who are allowed to import only a small quantity weekly, and thereby defendants have deprived and are depriving the public of the advantages which would arise from competition with foreign films.

Defendants created the General Film Company as a means for monopolizing the commerce of the rental exchanges in the manner hereinabove pointed out, and they are now maintaining and operating it with the same unlawful intent.

Between 70 and 80 per cent of the motion-picture film annually manufactured and sold in the United States is the product of the ten Patents Company licensees. This film is shipped by the manufacturers to 45 branches of the General Film Company scattered over the United States and distributed by the latter to approximately 7,000 exhibitors. Independent manufacturers of film may not distribute their product through the General Film Company, which is the sole distributing agency of the Patents Company licensees; exhibitors obtaining supplies of film from the General Film Company are not allowed to display the films of the independent

manufacturers. Independent exchanges are cut off from handling the film of the ten Patents Company licensees and independent exhibitors and theater owners can not obtain for exhibition in their theaters the pictures of the Patents Company licensees.

In conclusion, all the unlawful restraints and conditions contained in the license agreements and described in this petition defendants to-day are observing and enforcing, and will continue to observe and enforce unless restrained by this honorable court.

XIII.

Jurisdiction.

Petitioner avers that the combination and conspiracy to restrain interstate and foreign commerce and motion-picture films, machines, and apparatus relating to the motion-picture art still exists; that the defendants are carrying out and engaging in the same within the State of Pennsylvania within the Eastern District of said State, and that many of the things herein complained of have been committed in whole and others in part within the said State and district and are now being committed therein; that the defendant Lubin Manufacturing Company is located at and doing business within said State and district.

XIV.

Prayer.

Wherefore petitioner prays:

1. That the combination hereinbefore described, in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be decreed to be in restraint of interstate and foreign trade and an attempt to monopolize and a monopolization thereof within the first and second sections of the act of Congress of July 2, 1890, entitled "An act to

protect trade and commerce against unlawful restraints and monopolies."

2. That the court adjudge the Motion Picture Patents Company and the General Film Company, severally and respectively, to be a combination in restraint of interstate and foreign trade and commerce in motion-picture films and other articles relating to the motion-picture art, a restraint, and an attempt to monopolize and a monopolization thereof, and that the court direct a dissolution of each of said combinations.

3. That the court adjudge the Motion Picture Patents Company and the General Film Company, severally and respectively, to be an unlawful instrumentality operated and maintained by defendants solely for the purpose of carrying into effect the illegal purposes of said contracts, combinations, and conspiracies in restraint of interstate trade and commerce and of said attempts to monopolize, and monopolies.

4. That the court adjudge that the various so-called license agreements described in the petition, entered into between the Motion Picture Patents Company and the 10 Patents Company licensees, and the so-called license agreements between the Motion Picture Patents Company and the General Film Company, and the agreements between the General Film Company and the 10 Patents Company licensees, and all other license agreements referred to and described in the petition, were devised, planned, entered into, and are now being observed and enforced solely for the purpose of enabling the defendants to carry into effect the objects and purposes of said unlawful combination and conspiracy in restraint of said interstate and foreign trade and commerce; that each of said agreements be declared illegal, and be cancelled, and that the defendants, and all and each of them, and their officers, agents, servants, and employees, be enjoined and prohibited from

doing anything in pursuance or in furtherance of said agreements, and from enforcing in any manner said agreements, or any of the terms thereof, in interstate and foreign commerce.

5. That the court by way of an injunction restrain the movement of the products of the 10 Patents Company licensees and of the General Film Company in the channels of interstate commerce until the decree of the court respecting the Motion Picture Patents Company, the General Film Company, and the said so-called license agreements has been carried into effect by defendants and said Patents Company and General Film Company dissolved and said agreements cancelled.

6. That the court adjudge that the patents named in the so-called license agreements referred to and described in the petition, now claimed to be held and owned by defendant Motion Picture Patents Company, were acquired, and are now held by said defendant by virtue of such combination and conspiracy in restraint of trade and commerce among the several States and with foreign nations, and solely to effectuate the unlawful objects and purposes of the same, and that the said Motion Picture Patents Company, its officers, directors, and agents, be enjoined from exercising or attempting to exercise any control, direction, supervision, or influence whatever over the interstate or foreign commerce of the other defendants by virtue of said company holding said patents or otherwise.

7. That the defendants and all and each of them be enjoined and prohibited from entering into or continuing any similar combination or conspiracy, and from agreeing, combining, conspiring, and acting together to prevent each and any of them from carrying on interstate and foreign trade and commerce in motion picture films and other articles relating to the motion picture art in competition with the others.

S. That the United States may have such other and further relief as the nature of the case may require and the court may deem proper in the premises.

To the end, therefore, that the United States of America may obtain the relief to which it is justly entitled in the premises, may it please your honors to grant unto it writs of subpoena directed to the said defendants: Motion Picture Patents Company, General Film Company, the Biograph Company, Thomas A. Edison (Inc.), Essanay Film Manufacturing Company, the Kalem Company (Inc.), George Kleine, Lubin Manufacturing Company, Moies Manufacturing Company, Pathé Frères, Selig Polyscope Company, Vitagraph Company of America, Armat Moving Picture Company, Frank L. Dyer, Henry K. Marvin, J. J. Kennedy, William Palmer, Samuel Long, J. A. Berst, Siegmund Lubin, Gaston Melles, Albert E. Smith, George K. Spoor, W. N. Selig, and each and every one of them, commanding them and each of them to appear herein and answer, but not under oath (answer under oath being hereby expressly waived), the allegations contained in the foregoing petition and abide by and perform such orders and decree as the court may make in the premises.

JOHN C. SWARTLEY,
United States Attorney.

GEORGE W. WICKERSHAM,
Attorney General.

JAMES A. FOWLER,
Assistant to the Attorney General.

EDWIN P. GROSVENOR,
Special Assistant to the Attorney General.

EXHIBIT I.

Charter of Motion Picture Patents Company.

This is to certify that we, the undersigned, do hereby associate ourselves into a corporation under and by virtue of the provisions of an act of the legislature of the State of New Jersey entitled "An act concerning corporations (revision of 1806)," and the supplements thereto and acts amendatory thereof, for the purposes hereinafter mentioned, hereby claiming for ourselves all the rights and privileges now or hereafter granted by the laws of the State of New Jersey to corporations, and to that end we do by this our certificate set forth:

First. The name which we have assumed to designate such corporation and to be used in its business and dealings is "Motion Picture Patents Company."

Second. The location of the principal office of the corporation in this State is at No. 15 Exchange Place, Jersey City, in the county of Hudson. The name of the agent therein and in charge thereof upon whom process against the corporation may be served is Charles L. Curvick.

Third. The objects for which this corporation is formed are to acquire by purchase, lease, payment of royalties, or otherwise, letters patent, inventions and improvements in materials, processes, and apparatus relating to the production of negatives and positives for motion pictures, and also relating to the photographing, developing, reproducing, projecting, and exhibiting of scenes and objects at rest and in motion; to mortgage, sell, lease, dispose of by agreement or otherwise, such letters patent, licenses under letters patent, and improvements, and to license others to use the inventions covered by the said letters patent and to use such improvements; to purchase, hold, sell, and convey such real and personal property as shall be lawful and adapted to the requirements of the business of the company.

This corporation shall also have power to conduct its business in all its branches and to have one or more offices and to hold, lease, or convey real or personal property outside of the State of New Jersey and in all other States and in all foreign countries to which the business of the company may be hereafter extended, and to do any acts or things designed to protect, improve, or enhance the value of any of such patents and of other property of the corporation.

Fourth.—The amount of capital stock of the company is one hundred thousand dollars (\$100,000) divided into one thousand (1,000) shares of the par value of one hundred dollars (\$100) each. The amount of capital stock with which the company shall commence business is two thousand dollars (\$2,000).

Fifth.—The names and post-office addresses of the incorporators and the number of shares subscribed for by each are as follows:

Names.	Post-office addresses.	Number of shares.
Hugh H. Harrison, Brook Haven, N. Y.		10
Geo. J. Murray, 32 Park avenue, Avenae, L. I.		5
William H. Lane, 4 Boulevard, Westfield, N. J.		5

Sixth.—The existence of this corporation shall begin on the day of the filing of these articles of incorporation in the office of the secretary of state of New Jersey and shall continue for a period of fifty (50) years from that date.

In witness whereof we have hereunto set our hands and seals this 8th day of September, nineteen hundred and eight.

HUGH H. HARRISON. [L. S.]

Geo. J. MURRAY. [L. S.]

WILLIAM H. LANE. [L. S.]

In presence of Guernsey R. Jewett as to Hugh H. Harrison, Geo. J. Murray, and William H. Lane.

"Filed and recorded September 9, 1908.

"S. D. DICKINSON,
"Secretary of State."

EXHIBIT 2.

Preliminary Agreement for Assignment of Patents Between Motion Picture Patents Company and Edison Manufacturing Company, December 18, 1908.

Agreement made this 18th day of December, 1908, by and between the Motion Picture Patents Company, a corporation organized and existing under the laws of the State of New Jersey, and having an office at Jersey City in said State (hereinafter referred to as the "Patents Company"), party of the first part, and the Edison Manufacturing Company, a corporation organized and existing under the laws of the State of New Jersey, and having an office at Orange in said State (hereinafter referred to as the "Edison Company"), party of the second part:

(1) Whereas the Edison Company represents that it is the owner of all the right, title, and interest in and to reissued United States Letters Patent No. 12037, dated September 30, 1902, and reissued United States Letters Patent No. 12192, dated January 12, 1904, and that there are no outstanding licenses under the said letters patent other than those hereinafter referred to, and

(2) Whereas the Edison Company represents that it has heretofore granted licenses in writing to manufacture and use the inventions described and claimed in said reissued Letters Patent No. 12037, and to manufacture and sell the invention described and claimed in the said reissued Letters Patent No. 12192, to the Vitagraph Company of America, of New York; Siegmund Lubin, of Philadelphia; the Selig Polyscope Company of Chicago; the Essanay Company of Chicago; the Kalem Company of New York; and the George Meigs Company of Chicago, all dated January 31, 1908, and to Pathé Frères of New York, dated May 20, 1908, to go into effect June 20, 1908 (the licenses under said license agreements being hereinafter referred to as "Edison Licenses"), and the Edison Company further represents

that the said Edison Licensees are willing to suspend the operation of the said licenses; and

(3) Whereas, the Edison Company represents that it has heretofore entered into two agreements in writing, dated May 29, 1908, with the Eastman Kodak Company, a corporation of New York (hereinafter referred to as the "Eastman Company"), granting the right to the said Eastman Company to supply "licensed film" to the Edison Licensees, and that the Eastman Company is willing to terminate the said agreements; and

(4) Whereas, the Patents Company represents that it has an authorized capitalization of one hundred thousand dollars (\$100,000), of which twenty (20) shares of a par value of \$2,000 are outstanding, and whereas, the Edison Company desires to acquire fifty thousand dollars (\$50,000) of the capital stock of the Patents Company, and is willing to assign to the Patents Company all of its right, title, and interest in and to the said reassued United States letters patent and is willing to suspend the operation of the said licenses granted thereunder, and to terminate the said agreements with the Eastman Company, in consideration of the payment to the Edison Company of forty-nine thousand dollars (\$49,000) of the capital stock of the Patents Company, and one thousand dollars (\$1,000) in cash, provided that for the said one thousand dollars in cash, the Patents Company shall have assigned to the Edison Company ten (10) shares of the said capital stock at a par value of one thousand dollars (\$1,000); and

(5) Whereas, the board of directors of the Patents Company has ascertained, adjudged, and declared that the said right, title, and interest in the said reassued letters patent free from the operation of the said licenses and agreements, are of the fair value of fifty thousand dollars (\$50,000) and that the acquisition thereof is necessary for the business of the Patents Company and to carry out its contemplated objects; and

(6) Whereas, the Patents Company represents that it has acquired or will acquire from the Vitagraph Company of America, of New York, all the right, title, and interest in and

to United States Letters Patent Nos. 673320, 744251, 770937, 771280, 785205, and 785237 (hereinafter referred to as the "Vitagraph patents") all of which relate to motion picture projecting machines, and has agreed to pay to the said Vitagraph Company of America a royalty of one dollar (\$1) on each projecting machine embodying one or more of the inventions described and claimed in the said Vitagraph patents made and sold under any licenses for the manufacture and sale of such projecting machines, granted by the Patents Company (said royalties being hereinafter referred to as "Vitagraph royalties") and also further represents that it has acquired or will acquire from the American Mutoscope and Biograph Company, a corporation of New Jersey (hereinafter referred to as the "Biograph Company"), and the Armat Moving Picture Company, a corporation of West Virginia (hereinafter referred to as the "Armat Company"), all the right, title, and interest in and to United States Letters Patent Nos. 578185, 590749, 596093, 598915, 620003, 673992, 707934, and 723882, all of which relate to motion picture projecting machines or cameras; and

(7) Whereas, the Patents Company represents that it contemplates deriving royalties under patents covering projecting machines owned by the Patents Company from manufacturers of projecting machines (hereinafter referred to as "machine royalties"); royalties from exhibitors for the use of projecting machines licensed under any or all of the patents covering projecting machines owned by the Patents Company (hereinafter referred to as "exhibitors' royalties"), and royalties derived from manufacturers and importers of motion pictures under said reassued United States Letters Patent Nos. 12037 and 12192 (hereinafter referred to as "film royalties"); and

(8) Whereas, the Patents Company has agreed to pay to the manufacturers and importers of licensed motion pictures, except the Biograph Company and the Edison Company, 24 per cent (24%) of the gross exhibitors royalties;

Now, therefore, this indenture witnesseth that:

(9) The Edison Company, in and by these presents, does agree to assign, transfer, and set over unto the Patents

Company and its successors in business, the entire right, title, and interest in and to the said reissued United States Letters Patent, Nos. 12037 and 12192, and the inventions described and claimed therein, and the right to sue for and recover damages and profits for past infringement of the said reissued letters patent and of each of them, and to enter into agreements in writing with the said Edison Licensees suspending the operation of the licenses granted by the Edison Company under the said reissued United States Letters Patent to the said Edison Licensees, so long as the said reissued letters patent are owned by the Patents Company, and to enter into agreements in writing with the Eastman Company terminating the agreements in writing referred to in paragraph 3 herof, so long as the said reissued letters patent are owned by the Patents Company.

(10) The Patents Company hereby covenants and agrees, in consideration of the said agreement of the Edison Company, and upon the assignment of the said reissued letters patent to the Patents Company, and upon the making of the said agreements in writing by and between the Edison Company and the Edison Licensees and the Eastman Company, to issue to the Edison Company certificates of stock of the Patents Company to the aggregate amount of four hundred and ninety (490) shares, of a par value of forty-nine thousand dollars (\$49,000), and to pay to the Edison Company one thousand dollars (\$1,000) in cash, and the Patents Company further covenants and agrees that at the same time there shall be assigned to the Edison Company for the said \$1,000 in cash ten (10) shares of the capital stock of the Patents Company at a par value of one thousand dollars (\$1,000).

(11) The Edison Company covenants and agrees that it has canceled or will cancel any licenses, shop rights, or other rights which may have been heretofore granted under either or both of the said reissued United States letters patent to any person, firm, or corporation other than the Edison Licensees, and the Edison Company further covenants and agrees that it will save harmless in all respects the Patents Company from any claim under any agreement, contract, or other obligation which the Edison Company or its

predecessors in title may have entered into or assumed with any person, firm, or corporation concerning or involving any licenses, shop right, or other right under any or all of the said reissued letters patent.

(12) The Patents Company further covenants and agrees that it will keep in separate accounts the incomes from film royalties, from machine royalties, and from exhibitors' royalties, and that the general and contingent expense of the Patents Company (which shall not include any expense incurred in any litigation) shall not exceed fifty thousand dollars (\$50,000) in any one year. The Patents Company further covenants and agrees that on June 20, 1900, and at the end of each and every year thereafter until the expiration of the said reissued United States Letters Patent Nos. 12037, and 12192, and on August 14, 1914, the date of expiration of the said reissued letters patent, it will make up the accounts of and distribute the said royalties for the preceding year or portion thereof, as the case may be, in the following manner:

First. From the machine royalties shall be deducted the Vitaphone royalties for payment to the Vitaphone Company of America, and from the exhibitors' royalties shall be deducted 24 per cent (24%) thereof for payment to the manufacturers and importers of licensed motion pictures.

Second. From the film royalties and the remainders of the machine royalties and of the exhibitors' royalties shall be deducted the general and contingent expense for the preceding year or portion thereof, as the case may be, together with any expense for litigation which may have been incurred by the Patents Company, in shares proportioned according to the ratio which each of said sums bears to the gross income of the Patents Company for that year or portion thereof, the remainders of such sums after the said deductions are made being hereinafter referred to as "net film royalties," "net machine royalties," and "net exhibitors' royalties," respectively.

Third. The net film royalties, the net machine royalties, and the net exhibitors' royalties shall be paid to the trustee provided for in paragraph 14 of this agreement as a dividend

upon the capital stock of the Patents Company, and the said trustee shall be instructed to divide and pay the said dividend in the following manner:

(a) To the Edison Company shall be assigned and paid an amount equal to the net film royalties.

(b) The remainder of the dividend, up to an amount equal to the net film royalties, shall be assigned and paid to the Biograph Company and the Armat Company, respectively, in the proportion of two-thirds (2/3) to the Biograph Company and one-third (1/3) to the Armat Company.

(c) If any balance remains after the foregoing payments, it shall be divided and paid to the Edison Company, the Biograph Company, and the Armat Company, in the proportion of one-half (1/2) to the Edison Company, one-third (1/3) to the Biograph Company, and one-sixth (1/6) to the Armat Company.

(13) The Patents Company further covenants and agrees that, on August 31, 1915 (one year after the date of the expiration of reissued Letters Patent Nos. 12087 and 12192), and at the end of each and every year thereafter, it will pay to the trustee provided for in paragraph 14 of this agreement all of its net profits for the preceding year, which consists of the net machine royalties, the net exhibitors' royalties and the net sum of any royalties which the Patents Company may collect in lieu of the present film royalties (such net amounts being determined as provided for in paragraph 12 hereof) as a dividend upon the capital stock of the Patents Company, and will instruct the trustee to divide the said dividend and pay to the Edison Company therefrom an amount equal to one-half (1/2) of such dividend.

(14) The Edison Company further covenants and agrees not to pledge, sell or otherwise dispose of its capital stock in the Patents Company, except the minimum number of shares sufficient to qualify one-half of the total number of directors which the Patents Company may have, without the consent of the Biograph Company and the Armat Company, and the Edison Company further agrees to deposit its certificates of stock in the Patents Company, except such as represent the said qualifying shares for directors, with a responsible

trust company named by the Patents Company, as trustee, and to instruct the said trustee not to release, transfer, or return the said certificates so deposited, without the consent of the Biograph Company and the Armat Company. *70 h*

(15) It is further mutually covenanted and agreed by and between the Patents Company and the Edison Company that this agreement shall take effect on the date hereof, and that if during the life of this agreement either party should knowingly or through gross neglect or carelessness be guilty of a breach, violation, or nonperformance of its covenants, conditions, and stipulations, resulting in substantial injury to the other party, and should for the period of thirty days after notice thereof from the other party, persist therein or fail to correct, repair, or remedy the same, then and in such case the party aggrieved may terminate this agreement by giving thirty days' notice in writing to the guilty party of its intention so to do, and it is further mutually covenanted and agreed that this agreement may also be terminated by either of the parties hereto in case that the Patents Company should become bankrupt, cease doing business, or should be dissolved voluntarily or otherwise, or its charter should be repealed. It is also further mutually covenanted and agreed that, upon the termination of this agreement for any of the foregoing causes, or any other cause, all of the right, title, and interest in and to the said reissued United States Letters Patent Nos. 12087 and 12192 shall be resigned by the Patents Company to the Edison Company for and in consideration of the sum of one dollar (\$1).

In witness whereof, the parties hereto have caused this agreement to be executed by their officers duly authorized to perform these acts, the day and year first above written.

[SEAL.] MORTON PICTURE PATENT COMPANY,
By H. E. HARRISON, President.

Attest:

GEO. J. MURRAY, Secretary.

[SEAL.]

EDISON MANUFACTURING COMPANY,

By FRANK L. DYER, Vice President.

Attest:

A. WIRTH, Secretary.

EXHIBIT 3.

License Agreement Under the Camera and Film Patents Between Motion Picture Patents Company and Biograph Company, December 18, 1908.

(a) This agreement, made this 18th day of December, 1908, by and between Motion Picture Patents Company, a corporation organized and existing under the laws of the State of New Jersey, and having an office at Jersey City, in said State, party of the first part (hereinafter referred to as the Licensor), and American Vitoscope and Biograph Company, a corporation organized and existing under the laws of the State of New Jersey, and having an office at New York City, party of the second part (hereinafter referred to as the Licensee), witnesseseth:

(b) Whereas, the Licensor represents that it is organized to own, deal in, and grant licenses under letters patent pertaining to the motion-picture art, and that it is the owner of all the right, title, and interest in and to United States Letters Patent—

- No. 578185, dated March 2, 1897, for Vitascopes, granted to Thomas Armat;
- No. 580749, dated April 13, 1897, for Vitascopes, granted to Thomas Armat;
- No. 586983, dated July 20, 1897, for Phantoscopes, granted to Charles F. Jenkins and Thomas Armat;
- No. 588916, dated August 24, 1897, for Kinetoscopes, granted to Charles M. Campbell as the assignee of Willard G. Steward and Ellis F. Frost;
- No. 629063, dated July 18, 1899, for Kinetoscopic Camera, granted to American Mutoscope Company as the assignee of Herman Caslet;
- No. 678329, dated April 30, 1901, for Kinetoscope, granted to the American Vitograph Company as the assignee of Albert E. Smith;

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ORIGINAL PETITION, EXHIBIT 3.

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- No. 678992, dated May 14, 1901, for Vitascopes, granted to Thomas Armat;
- No. 707934, dated August 26, 1902, for Projecting Kinetoscope, granted E. & H. T. Anthony & Co. as assignees of Woodville Latham;
- No. 722382, dated March 10, 1903, for Animated Picture Apparatus, granted to American Mutoscope & Biograph Company as the assignee of John A. Pross;
- No. 744251, dated November 17, 1903, for Kinetoscope, granted Albert E. Smith;
- No. 770937, dated September 27, 1904, for Kinetoscope, granted the Vitagraph Company of America as the assignee of Albert E. Smith;
- No. 771280, dated October 4, 1904, for Winding-Reel, granted Albert E. Smith;
- No. 785205, dated March 21, 1905, for Flame-Shield for Kinetoscopes, granted the Vitagraph Company of America as the assignee of William Ellwood; and
- No. 785237, dated March 21, 1905, for Film-Holder for Kinetoscopes, granted the Vitagraph Company of America as the assignee of Albert E. Smith;

all of which said letters patent relate to improvements in the motion picture art, and that there are no outstanding licenses, shop rights, or other rights under said letters patent, or either of them, except a license for Parlor Kinetoscopes granted the Karamita Company, of Washington, D. C., under Letters Patent Nos. 578185, 580749, 586983, and 673992, and certain alleged licenses under U. S. Letters Patent No. 586983, which are in dispute, claimed to be owned by the Edison Company and the American Graphophone Company, of Washington, D. C., and S. Lubin, of Philadelphia, Pennsylvania; and excepting a license granted by the American Mutoscope & Biograph Company to the firm of Marvin and Casler to manufacture and sell cameras and exhibiting or projecting machines under letters patent owned by it (some of which are hereinbefore referred to) for use in foreign countries only, and excepting certain licenses granted by the Armat Motion Picture Company to the American Mutoscope & Biograph Company under

Letters Patent Nos. 578185, 580749, 580963, 588916, and 673992, and by the latter company to the former company under Patents Nos. 707934 and 722382, which licensees are, however, by agreement between said parties, suspended and are not to be acted upon until the Licensor becomes bankrupt, ceases doing business, or shall be dissolved voluntarily or otherwise, or its charter shall be repealed; and

(c) Whereas, the Licensor is the owner of all the right, title, and interest in and to reissued Letters Patent of the United States Numbered 12037, dated September 30, 1902, and 12192, dated January 12, 1904, the original Letters Patent whereof are Numbered 589168 and dated August 31, 1897, and that there are no outstanding licenses, shop rights, or other rights under said reissued letters patent, or either of them, except license agreements thereunder between the Edison Company and Pathe Freres of New York, dated May 29, 1903 (to go into effect June 29, 1903), and between the Edison Company and the Kalem Company, of New York; the Essanay Company, of Chicago; Siegmund Lubin, of Philadelphia; George Melies Company, of Chicago, Illinois; the Selig Polyscope Company, of said Chicago, and the Vitaphone Company of America, of New York, all dated January 31, 1903; and

(d) Whereas, the Edison Company, the Licensee and the other licensees before mentioned under the said reissued Letters Patent, Numbered 12037 and 12192, have suspended the operation of the said license agreements; and

(e) Whereas, the Licensee is engaged in the manufacture and sale of motion pictures, including the printing of positive motion pictures from negative motion pictures of the Licensee's own production, and, relying upon the aforesaid representations of the Licensor, and induced thereby, desires to obtain from the Licensor a license under said two reissued Letters Patent Numbered 12037 and 12192, and Letters Patent Nos. 629063 and 707934, and to lease positive motion pictures for use in exhibiting or projecting machines containing the inventions, or any of them, described and claimed in said Letters Patent Nos. 578185, 580749, 580963, 588916, 673992, 707934, 722382, 744251, 770937, 771280,

785205, and 785237, and to sell positive motion pictures on film of a width approximately one (1) inch or less in certain territory and on film of any width in certain territory:

(f) Now therefore, the parties hereto, for and in consideration of the sum of one dollar to each in hand paid by the other, and for other good and valuable considerations from each to the other moving, receipt of all of which is hereby acknowledged, have agreed as follows:

1. The Licensor hereby grants to the Licensee for the term and subject to the covenants, conditions, and stipulations hereinafter expressed, the right and license under said reissued Letters Patent No. 12037 and Letters Patent Nos. 629063 and 707934, for the United States, its territories, dependencies, and possessions (hereinafter called the "territory aforesaid") to manufacture and use such a number of cameras embodying the inventions of said reissued Letters Patent No. 12037 and Letters Patent Nos. 629063 and 707934, as may be necessary for the proper conduct of the Licensee's business, and to manufacture, print and produce positive motion pictures embodying the inventions of said reissued Letters Patent No. 12192, and to lease the same in the United States, its territories, dependencies, and possessions (with the exceptions of its insular possessions and Alaska), hereinafter referred to as the "lease territory aforesaid," on film of a greater width than approximately one (1) inch, upon condition that they be used solely in exhibiting or projecting machines containing the inventions or some of them of said Letters Patent Nos. 578185, 580749, 580963, 588916, 673992, 707934, 722382, 744251, 770937, 771280, 785205 and 785237, and licensed by the Licensor, and to sell positive motion pictures embodying the invention of said reissued Letters Patent No. 12192, on film of a width approximately one (1) inch or less in the "lease territory aforesaid" and on film of any width in or for said insular possessions and Alaska and foreign countries, hereinafter referred to as "said export territory" or "for export."

The License hereby granted is personal to the Licensee and does not include the right to dispose of, in the "territory aforesaid," any cameras embodying any invention covered

by said reissued Letters Patent No. 12037 and Letters Patent No. 629063 and 707394; and, in the event of the permanent discontinuance or retirement from business of the Licensee for a period of six consecutive months, the license hereby granted shall be immediately terminated.

2. The Licensor, for itself, its successors, assigns and legal representatives, hereby releases, acquits, and discharges the Licensee from any and all claims, demands, and liability for profits and damages, because of any infringement by the Licensee of any or all of the aforesaid United Letters Patent Nos. 578185, 580740, 580953, 588916, 629063, 673329, 678992, 707394, 722382, 744251, 770037, 771280, 785205, and 785237, and reissued Letters Patent Nos. 12037 and 12192, or use by the Licensee of the inventions, or any of them, covered by said letters patent or either of them prior to the date hereof.

3. The Licensee hereby recognizes and admits the validity of said reissued Letters Patent No. 12037, so far as the first three claims thereof are concerned, and the validity of said reissued Letters Patent No. 12192 and Letters Patent Nos. 578185, 580740, 580953, 588916, 629063, 673329, 673992, 707394, 722382, 744251, 770037, 771280, 785205, and 785237, and the Licensee agrees not to contest or question the same during the continuance of this agreement.

4. The Licensee covenants and agrees that in the manufacture of motion pictures, both negative and positive in the "territory aforesaid," during the continuance of this agreement, the Licensee will use exclusively sensitized film manufactured and sold in the United States by a manufacturer or manufacturers authorized by the Licensor, such sensitized film hereinafter called "licensed film," and that the Licensee will not, in the "territory aforesaid," purchase or otherwise acquire or lease or sell or otherwise dispose of or deal in, motion pictures produced on or by the use of any other film than such "licensed film," nor sell or otherwise dispose of any negative motion pictures.

The Licensor further covenants and agrees that it will, in an agreement in writing with each manufacturer of "licensed film," obligate such manufacturer, so long as

the latter has the exclusive right to make and sell such "licensed film," not to knowingly furnish or sell, in the "territory aforesaid," except "for export," sensitized film for the commercial production of negative and positive motion pictures to anyone but the Licensee, and the additional licensees hereinafter provided for, except to the extent of $2\frac{1}{2}$ per cent of the total amount of such "licensed film" supplied by such manufacturer to the parties to the license agreements referred to in paragraph (c) during the year preceding June 30, 1909, and to the Licensee and the additional licensees hereinafter provided for, during any one year thereafter during the continuance of such agreement, which amount such manufacturer shall have the right to furnish or sell, in the "territory aforesaid," to persons not engaged in the business of manufacturing, leasing, selling, loaning, renting out, or otherwise disposing of or dealing in motion pictures in the "territory aforesaid"; and with the further exception that such manufacturer may also reserve the right to manufacture and sell sensitized film suitable for the commercial production of negative and positive motion pictures, of a width not to exceed approximately one (1) inch in the "territory aforesaid," to persons, firms, and corporations engaged in the business of manufacturing, leasing, selling, loaning, renting out, or otherwise disposing of or dealing in motion pictures in the "territory aforesaid," but upon the condition that in case any of them produces thereon any picture greater in size than approximately three-quarters ($\frac{3}{4}$) of an inch on a line either parallel to or at right angles to the edge of such film, and such manufacturer has knowledge thereof, such manufacturer will cease supplying such film to any person, firm, or corporation so doing; and with the further exception that such manufacturer may also reserve the right to manufacture and sell in the "territory aforesaid" such sensitized film suitable for the commercial production of negative and positive motion pictures of any width, to persons, firms, and corporations now having an established business of manufacturing motion pictures in any country foreign to the United States, who now manufacture negative and positive

motion pictures in the United States, or who may after the date of this agreement commence the manufacture of negative or positive motion pictures in the United States.

The Licensor further covenants and agrees that the royalties which it will charge to and receive from the Licensee for "licensed film" (and which are to be included by the manufacturer or manufacturers in the prices charged for "licensed film" to the Licensee and paid over to the Licensor) shall not, for "licensed film" of a width approximately one inch and three-eighths of an inch (1 3/8 in.) or thirty-five (35) millimeters, purchased by the Licensee during the year preceding June 20, 1909, and during any year thereafter during the continuance of this agreement, as hereafter provided, exceeding the following rates; that is to say:

If the shipments of such "licensed film" to the Licensee, or the Licensee's orders, for any such year be four million running feet or less, a royalty of one-half (1/2) cent per running foot on the total number of running feet for that year; if such shipments, on the Licensee's orders, of such "licensed film" for any such year exceed four million running feet but do not exceed six million running feet, a royalty of four and one-half (4 1/2) mills per running foot on the total number of running feet for that year; if such shipments, on the Licensee's orders, of such "licensed film" for any such year exceed six million running feet but do not exceed eight million running feet, a royalty of four (4) mills per running foot on the total number of running feet for that year; if such shipments, on the Licensee's orders, of such "licensed film" for any such year exceed eight million running feet but do not exceed ten million running feet, a royalty of three and three-quarters (3 3/4) mills per running foot on the total number of running feet for that year; and if such shipments, on the Licensee's orders, of such "licensed film" for any such year exceed ten million running feet, a royalty of three and one-quarter (3 1/4) mills per running foot on the total number of running feet for that year. And for "licensed film" narrower or wider than approximately one and three-eighths (1 3/8 in) inch or thirty-five (35) millimeters, the above-mentioned royalty rates shall be reduced or increased

in proportion to the reduction or increase in width of such narrower or wider "licensed film" below or above the width of such "licensed film" of approximately one and three-eighths (1 3/8 in.) inch or thirty-five (35) millimeters.

The Licensor and Licensee further mutually covenant and agree that the manufacturer of such "licensed film" shall in the first instance—that is to say, when such film is billed and shipped by it—charge the Licensee with its price per running foot plus the maximum royalty aforesaid, and on the expiration of each year, counting from June 20th, 1909, shall adjust the royalty account of the Licensee as to "licensed film" so billed and shipped to and paid for by the Licensee, according to the royalty schedule aforesaid, returning to the Licensee any amount the Licensee shall have overpaid, according to said schedule, and paying the balance to the Licensor; and that the royalties which may hereafter be paid to the manufacturer of such "licensed film" after the date hereof and up to June 20, 1909, under this agreement, shall be adjusted and the excess returned, in the same manner, the royalty rate to be charged for such period being the rate that would have been charged if the shipments of "licensed film" to the Licensee had been continued for a year at the same rate at which shipments were made for such period.

The Licensor further agrees that the dealings between the Licensee and the authorized manufacturer or manufacturers from whom the Licensee purchases such "licensed film" shall, in so far as the number of running feet ordered by or shipped to the Licensee or anything that would indicate or disclose the number of such feet is concerned, be a matter of confidence between the Licensee and such manufacturer or manufacturers, who shall not be at liberty to disclose, and moreover shall be bound in writing not to disclose, directly or indirectly, to the Licensor or any of the additional licensees hereinafter provided for, the number of such feet of "licensed film" so ordered by or shipped to the Licensee; the Licensor further agreeing to so arrange or provide for the reports and royalty payments to be made to it by such manufacturer or manufacturers that the

latter shall make such reports and royalty payments in gross as to all of the licensees to whom shipments of such "licensed film" are made, and without specifying the number of running feet of "licensed film" so shipped to any of them, either by a statement in writing of the number of such feet or the amount of royalties paid or to be paid by such manufacturer or manufacturers for or on account thereof.

The Licensor and Licensee further mutually covenant and agree that no royalty other than or in addition to that provided for in this paragraph shall be charged to or collected from the Licensee by the Licensor up to June 20, 1910, or during any renewal of this agreement up to August 31, 1914, the date of the expiration of said reissued Letters Patent Nos. 12037 and 12192, and no royalty whatever shall be charged to or collected from the Licensee by the Licensor after either the first, second, and third claims of said reissued Letters Patent No. 12037 and either of the claims of said reissued Letters Patent No. 12192, in any suit as hereinafter provided for, for infringement thereof, are held invalid by a court that has heard and decides such suit, or after August 31, 1914, during any renewal of this agreement; and that the Licensor shall charge royalties or rents for the use of all exhibiting or projecting machines capable of exhibiting or projecting motion pictures on film of a width greater than approximately one (1) inch, containing the inventions, or any of them, described and claimed in the aforesaid Letters Patent Nos. 673183, 680740, 680983, 688916, 673320, 673902, 707934, 723382, 744251, 770937, 771280, 785205, and 785237, licensed by the Licensor and that all such royalties or rents shall be collected by the Licensor, directly or indirectly from the exhibitors using such machines, and shall be fixed by the Licensor and charged and collected from such exhibitors by the Licensor at such a rate as to average as nearly as possible a royalty or rental of two dollars (\$2.00) per week for each such licensed machine in use.

5. The Licensee further covenants and agrees not to sell or otherwise dispose of or offer for sale, in the "territory

aforesaid," unexposed positive or negative "licensed film" during the continuance of this agreement; but this provision shall not prevent the Licensee from selling as refuse, in the "territory aforesaid," second-hand positive or negative motion pictures or motion pictures which have been used or become shopworn or in any way damaged, to a manufacturer or manufacturers of "licensed film" or to a manufacturer to manufacture other articles than film therefrom, but only after they have been rendered by the Licensee unsuitable for use as motion pictures by cutting or otherwise defacing them; or from selling exposed positive or negative film (either waste or in rolls) known as "blank film" for use by dealers, renters, or exhibitors for leaders or for spacing or for similar purposes, but which shall not, and can not be otherwise employed for the exhibition of motion pictures.

6. The Licensee further covenants and agrees not to lease, loan, rent out, sell or offer for sale, or otherwise dispose of in the "territory aforesaid," motion pictures to anyone purchasing or otherwise obtaining, leasing, using, loaning, renting out, selling, offering for sale, or otherwise disposing of or dealing in motion pictures containing the invention of said reissued Letters Patent No. 12192, not the output of the Licensee or of the additional licensees hereinafter provided for.

7. The Licensee further covenants and agrees to mark each and every camera which the Licensee may make or use under this agreement embodying the inventions of reissued Letters Patent No. 12037, Letters Patent Nos. 629093 and 707934, or either of them, with the word "Patented" followed by the dates of grant of all of the said letters patent, the inventions claimed in which are embodied in the said camera or apparatus, and to photographically print the Licensee's trade-mark in each picture of at least one scene of each subject of positive motion pictures on film of a greater width than approximately one (1) inch manufactured by the Licensee and leased in the "terrace territory aforesaid," and to mark conspicuously on the labels which shall be placed on boxes or packages containing positive motion pictures on film of a greater width than

approximately one (1) inch manufactured by the Licensee in the "territory aforesaid," with the following words and figures:

LICENSED MOTION PICTURE.

Manufactured and leased by and property of

(Patented in the United States August 31, 1897; reissued January 12, 1904).

The enclosed motion picture is leased only and upon the following terms and conditions:

1. That the lessee shall not sell or otherwise dispose of the same outright, but shall have only the right to sublet or use such motion picture.
 2. That the lessee shall permit such motion pictures to be exhibited only on motion picture projecting machines licensed by the Motion Picture Patents Company of New Jersey under its patents covering such projecting machines.
 3. That the lessee shall not sublet such motion picture or any other motion picture containing the invention of the above released patent for use in any motion-picture exhibitions at a lower subrental price, directly or indirectly, than that agreed upon (if any) in the contract of lease between the lessee and the lessor of this picture.
 4. That the lessee or user thereof shall not make or permit others to make any reproduction, commonly known as a "dupe," of such motion picture or any other motion picture containing the inventions of the above released patent.
 5. That the lessee or user thereof shall not remove the trade-mark or trade name or title therefrom.
 6. That the violation of any of the foregoing conditions entitles the lessor to immediate possession of this motion picture without liability for any price which the lessee or the person in whose possession it is found may have paid therefor.
- The Licensor further covenants and agreed to use all possible diligence in licensing exhibiting or projecting machines now in use in the "lease territory aforesaid"

embodying any or all of the inventions described and claimed in the said Letters Patent Nos. 578185, 580749, 586053, 588916, 673829, 673892, 707934, 723882, 744251, 770937, 771289, 785205, and 785287, and that royalties or rents from the users of such exhibiting or projecting machines will not be exacted, directly or indirectly, until February 1st, 1900.

8. The Licensee further covenants and agrees not to use, in the production of negative or positive motion pictures, under this agreement, the negative or positive motion pictures (or reproductions commonly known as "duplicates" of the negative or positive motion pictures), of any other manufacturer or person, firm, or corporation located either in the "territory aforesaid" or in any foreign country, whether the same have or have not been copyrighted in the "territory aforesaid" or in any foreign country.

9. The Licensor has established the following scale of minimum prices (which the Licensee admits is a fair and reasonable one) for the lease of positive motion pictures on film of a greater width than approximately one (1) inch in the "lease territory aforesaid" embodying the invention of said reissued Letters Patent No. 12192:

Lat.	13 cents per running foot.
Standing order.....	11 cents per running foot.
Films leased between two and four months after release date.....	9 cents per running foot.
Films leased between four and six months after release date.....	7 cents per running foot.
Films leased over six months after release date.....	5 cents per running foot.

The Licensor and Licensee further mutually covenant and agree that the above scale of minimum prices is to remain in force until a new scale of prices is adopted, each such new scale to be adopted, during the continuance of this agreement, by a majority vote to be forthwith communicated to the Licensor of the Licensee and the several additional licensees hereinafter provided for, or such of them as may at the time be licensees on the basis of one vote for each thousand running feet of new subjects on film of a greater width than approximately one (1) inch offered for lease or sale in the "territory aforesaid" by each licensee during the year preceding the taking of such vote; and

they further covenant and agree that any changes which may hereafter be so made and communicated to the Licensor in said scale of prices, and of which the Licensee shall be notified in writing by the Licensor, shall be accepted and adopted by the Licensee in the place and stand of the scale of prices above given or of any substitute or substitutes therefor adopted prior to such change. It is, however, expressly mutually covenanted and agreed that in no case shall such new scale of prices, either list or standing order, be less than nine (9) cents per running foot for any motion picture leased within four months of the date of release of the said motion picture.

By the expression "running feet of new subjects" above referred to, and hereafter used, the parties hereto mean the aggregate amount ascertained by adding together the individual number of running feet of one print of each and every new motion picture on film of a greater width than approximately one (1) inch, regularly listed and offered for lease in the "lease territory aforesaid."

The Licensor and Licensee further mutually covenant and agree that in case, during the continuance of this agreement, there should be for any reason only three such licensees, then, and in such case, the Licensor may adopt a minimum scale of prices in the place and stand of the minimum scale of prices above given or of any substitute or substitutes therefor adopted in the manner above provided, which, however, shall in no case be above the minimum scale of prices that may be in force at the time the Licensor adopts the said new minimum scale of prices, which said new minimum scale of prices shall be binding upon the Licensee, but only after receiving notice thereof in writing from the Licensor.

10. The Licensor and Licensee further mutually covenant and agree that an order in the "lease territory aforesaid," for one or more positive motion pictures of each and every new subject made by the Licensee (except chrono-photographic subjects and other special subjects that are announced and advertised as special by the Licensee and of which no copy or print is leased by the Licensee for less than list price within two (2) months after release date) when

offered for lease in the regular order of business, shall constitute a "standing order" within the meaning of the scale of prices aforesaid or any substitute therefor hereafter adopted, said standing order to remain in force for not less than fourteen (14) consecutive days; and the parties hereto further mutually covenant and agree that the minimum price at which any additional positive motion pictures shall be leased, in the "lease territory aforesaid," subsequent to the filling of a standing order, shall be the same per running foot as the pictures furnished on such standing order, unless otherwise provided for in the scale of prices aforesaid or any substitute therefor hereafter adopted. All positive motion pictures which may be hereafter leased in the "lease territory aforesaid," to persons not having a standing order, as above defined, shall in every case be leased at not less than the list price mentioned in said scale of prices or any substitute therefor hereafter adopted, except it be otherwise provided by a majority vote of the Licensee and the several additional licensees hereinafter provided for, or such of them as may at the time be licensees, on the basis of one vote for each thousand running feet of new subjects, on film of a greater width than approximately one (1) inch, offered for lease or sale in the "territory aforesaid" by each licensee during the year preceding the taking of such vote, and except as provided for in paragraph 12 as to "special motion pictures."

11. The Licensor and Licensee further mutually covenant and agree that positive motion pictures made by or for the Licensee and unsold prior to the date hereof, shall be subject to the scale of prices aforesaid and shall be leased in the "lease territory aforesaid" at not less than the prices fixed in said scale for positive motion pictures as provided for in paragraphs 9 and 10.

12. The Licensor and Licensee further mutually covenant and agree that in the case of so-called "special motion pictures" (where it is agreed by the Licensee that the negative shall be the exclusive property of the person ordering the same, although remaining in the care and custody of the Licensee, and where positive prints therefrom shall be made from time to time on the order of such person), the price to

be paid for the making of such negative in the "territory aforesaid" shall not be less than one dollar (\$1) per running foot, and that the price at which positive prints therefrom shall be leased in the "territory aforesaid," shall not be less than fifteen (15) cents per running foot.

13. The Licensee further covenants and agrees not to lease motion pictures in the "lease territory aforesaid," under any circumstances, either directly or indirectly, during the continuance of this agreement, at lower prices than those fixed and established as provided for in paragraphs 9, 10, 11, and 12.

14. It is further and mutually covenanted and agreed by the Licensor and Licensee that the Licensee shall have the right to sell motion pictures in or for "said export territory," and that the prices above referred to in paragraphs 9, 10, 11, and 12, or any substitute or substitutes for the same hereafter adopted, shall not apply to sales or shipments of motion pictures made *bona fide* for export, when the goods, addressed to the purchaser, agent, or consignee, are delivered to the vessel or to a transportation company for transportation to "said export territory" and not otherwise.

The Licensor and Licensee further mutually covenant and agree that in no case shall sales "for export" of motion pictures be knowingly made by the Licensee to persons, firms, or corporations whom such Licensee has reason to believe will reimport them into the "lease territory aforesaid" for sale or use.

15. The Licensor and the Licensee further mutually covenant and agree that, except as provided for in paragraph 5, the Licensee will not sell or lease, or offer for sale or lease in the "territory aforesaid" at reduced prices, second-hand motion pictures or motion pictures which have been used or which have become shopworn or in any way damaged.

16. The Licensor and the Licensee further mutually covenant and agree that in the "lease territory aforesaid," all leases of positive motion pictures shall be at the prices hereinbefore provided for, without the allowance of any discounts or rebates or other reduction (except such as may be

adopted by the unanimous votes of all the licensees) by which a lessee might acquire positive motion pictures at lower prices than those set forth in Paragraphs 9, 10, 11, and 12, or any substitutes therefor hereafter adopted, and that the Licensee will not dispose of such positive motion pictures as premiums, or by lottery, or raffle, or any game of chance, or in any way whereby they may be acquired directly or indirectly for less than the prices set forth in paragraphs 9, 10, 11, and 12, or substitutes therefor.

The Licensee further covenants and agrees that, in the "lease territory aforesaid," the Licensee will not sell or offer for sale other goods or merchandise at less than current prices in order to induce the lease of positive motion pictures, nor present or donate other goods or merchandise or prizes, or make use of credit cards or trading stamps, or offer any premiums of any kind whatsoever to induce the lease of such positive motion pictures.

17. It is further mutually covenanted and agreed by and between the Licensor and Licensee that no lease of positive motion pictures on film of a greater width than approximately one (1) inch shall be made in the "lease territory aforesaid" by the Licensee, except upon and subject to the following terms and conditions, the substance of which (with the exception of the condition as to the return of positive motion pictures hereinafter referred to) shall be expressed in a printed notice on the labels, as provided for in paragraph 7, accompanying each positive motion picture, namely: (1) That the lessee of such positive motion picture shall not sell or otherwise dispose of the same outright, but shall only have the right to use such positive motion picture in giving motion-picture exhibitions in machines licensed by the Licensor under the said letters patent Nos. 578185, 589749, 589553, 589516, 673329, 673952, 707354, 723352, 744251, 770357, 771250, 783255, and 783257, or one or more of them, or under any other letters patent that it may hereafter acquire or control, or to sublease such motion picture for use in such machines, and that (2) the lessee shall not make or permit others to make any reproduction commonly known as a "dupe" of such positive motion picture or any other

positive motion picture containing the invention of said reissued Letters Patent No. 12192, or (3) sublease the same or any other positive motion picture on film of a greater width than approximately one (1) inch containing the invention of said reissued Letters Patent No. 12192, for use in giving motion-picture exhibitions at a lower lease price directly or indirectly than that prescribed by the Licensee at the time of the lease of such motion picture, and (4) that the lessee of such positive motion picture shall not remove the trade mark or trade name or title therefrom, and (5) that the lessee shall return to the Licensee from whom such positive motion picture has been leased (without any payment therefor except the transportation charges incident to the return of the same) on the first day of every month, beginning with February 1, 1909, an amount of positive motion pictures (on film of a greater width than approximately one (1) inch) in running feet (not leased by the Licensee over six months before) and of the make of the licensee, to whom it is returned, equal to the amount that was so leased during the sixth month preceding the date of each such return; with the exception, however, that where any such positive motion pictures are destroyed by fire or lost in transportation, and proof satisfactory to the Licensee is furnished as to such destruction or loss, the amount so destroyed or lost shall be deducted from the amount to be returned, as aforesaid.

It is further mutually covenanted and agreed by and between the Licensor and Licensee that the subleasing price aforesaid for subleasing of positive motion pictures, on film of a greater width than approximately one (1) inch, shall be fixed (and which may be changed in the same manner during the continuance of this agreement, as may also the fifth condition before recited in this paragraph) by a majority vote of the Licensee and the several additional licensees hereinafter provided for, or such of them as may at the time be licensees, on the basis of one vote for each thousand running feet of new subjects, on film of a greater width than approximately one (1) inch, offered for lease or sale in the "territory aforesaid" by each licensee during the year preceding the taking of such vote.

The Licensee further covenants and agrees that in the "lease territory aforesaid" the Licensee will not discriminate in favor of any lessee, or place upon any motion pictures any restrictions other than those specified in this paragraph and paragraph 7 hereof, unless authorized by a majority vote of the Licensee and the several additional licensees hereinafter provided for, or such of them as may at the time be licensees.

18. The Licensee covenants and agrees that in the "lease territory aforesaid" the Licensee will dispose of the positive motion pictures, on film of a greater width than approximately one (1) inch, manufactured, produced, or printed by the Licensee, only by the sale "for export" and shipment thereof into "said export territory" or by the lease thereof to others for the purpose only of either subleasing the same to persons, firms, or corporations using such motion pictures for giving exhibitions thereof in exhibiting or projecting machines licensed by the Licensor containing the inventions, or some of them, described and claimed in said Letters Patent Nos. 578185, 580740, 580953, 588916, 673329, 673992, 707034, 722829, 744251, 770387, 771286, 785205, and 785237, or in letters patent hereafter acquired or controlled by the Licensor, or of using the same in such machines so licensed; and will not use the same for the purpose of giving exhibitions thereof for profit, directly or indirectly; it being expressly understood and agreed by and between the Licensor and Licensee, however, that the Licensee shall be at liberty to give exhibitions of such positive motion pictures without profit, directly or indirectly, and to possible or prospective lessees or purchasers thereof; and the Licensee further covenants and agrees not to knowingly allow positive motion pictures, on film of a greater width than approximately one (1) inch, manufactured by the Licensee under this agreement, to be leased for use with any exhibiting or projecting machine not licensed by the Licensor under the letters patent mentioned in this paragraph, and that it may hereafter acquire or control, or one or more of them, except by and with the consent of the Licensor; and also to refrain from supplying such motion pictures manufactured or imported under this agreement, for use with any exhibiting or projecting machine the

license for which, under the aforesaid letters patent, or one or more of them, has been terminated, and the Licensee has been notified thereof by the Licensor; and also to refrain from supplying such motion pictures manufactured and imported under this agreement to any lessee who may sublet such motion pictures to persons, firms, or corporations using the same for giving exhibitions thereof in exhibiting or projecting machines not licensed by the Licensor as aforesaid, or the license for which has been terminated and the Licensee has been notified by the Licensor that any such lessee continues to so sublet such motion pictures after being notified by the Licensor not to do so; and the Licensor covenants and agrees to promptly notify any such lessee who may so sublet such motion pictures, after it has knowledge of any such subletting, and to notify the Licensee and the additional licensees hereinafter provided for, or such of them as may at the time be licensees, of the termination of any license for the use of any exhibiting or projecting machines under the aforesaid letters patent, or any of them, and of any such lessee who may so sublet such motion pictures, after being notified by it not to do so, and to compel all such additional licensees to refrain from supplying motion pictures for use with any such exhibiting or projecting machine the license for which has been so terminated, or to any such lessee.

15. The Licensor and Licensee further mutually covenant and agree that the Licensor shall and will, during the continuance of this agreement, promptly institute suits against any and all infringers of the letters patent, or any of them, mentioned in this agreement, on the request of a majority of the licensees, including the Licensee and the several additional licensees hereinafter provided for, or such of them as may at the time be licensees, and will thereafter diligently prosecute any such suit or suits to final hearing and decision; all expense connected with the institution and prosecution of such suit or suits to be borne by the Licensor, who shall also be entitled to receive and apply to its own use all recoveries had therein for damages and profits.

The Licensor and Licensee further mutually covenant and agree that if in case any such suit is brought upon said reissued Letters Patent Nos. 12037, 12192, or said Letters Patent Nos. 586953 or 722382, either of the claims of said reissued Letters Patent No. 12192 or either of the first, second, or third claims of said reissued Letters Patent No. 12037, or any of the claims in issue in any such suit upon said Letters Patent Nos. 586953 or 722382, is or are held invalid by a court that last hears and decides such suit, or should be held by such court not to be infringed, then, and in any such case, the Licensee may at once terminate this agreement and the license thereby granted, by giving notice of its election so to do to the Licensor.

The Licensor and Licensee further mutually covenant and agree that the Licensor may, at its own expense (except as hereinafter provided), during the continuance of this agreement, institute and prosecute suits against any of the several additional licensees hereinafter provided for, for any breach or violation on the part of any such licensee of the covenants respecting prices at which positive motion pictures shall be leased in the "lease territory aforesaid," and also for violation of any of the other terms, conditions, or stipulations entered into by such licensee; that the Licensor shall at the end of each year, counting from the day and year first above written, render to the Licensee and the other licensees hereinafter provided for, or such of them as may at the time be licensees, a statement in writing showing in detail all legal expenses incurred by it during such year in the prosecution of such suit or suits; and that up to, but not exceeding, the sum of twenty thousand dollars (\$20,000) for any such year, all such legal expenses, in so far as they may be reasonable and proper, shall be borne and paid by the Licensee and the several additional licensees hereinafter provided for, *pro rata* according to the number of thousand running feet of new subjects, offered for lease by each relatively to the total number of thousand running feet of new subjects, on film of a greater width than approximately one (1) inch, offered for lease or sale by all in the "territory aforesaid," during the year preceding the rendition of such statement, any legal

expenses in excess of said twenty thousand dollars (\$20,000) during any such year to be borne and paid by the Licensor unless the Licensor and the Licensee and the several additional licensees hereinafter provided for should hereafter mutually agree otherwise.

20. It is mutually covenanted and agreed by and between the Licensor and Licensee that the Licensor may grant other licenses under said reassued Letters Patent Nos. 12037 and 12192 and said Letters Patent Nos. 629063 and 707934, so far as the use of the inventions thereof in cameras is concerned, said licenses to be in writing and not to exceed nine in number, seven to be to the persons and corporations mentioned in paragraph c as having license agreements with the Edison Company, one to the Edison Company, and one to George Kleine, of Chicago, Illinois (except by a majority vote of the Licensee and the nine other licensees, or such of them as may at the time be licensees, on the basis of one vote for each thousand running feet of new subjects, on film of a greater width than approximately one (1) inch, offered for lease or sale in the "territory aforesaid" by such licensees during the year preceding the taking of such vote), and not to be granted or continued upon terms, conditions, or stipulations which are in any respect more favorable to the licensees named therein than those set forth in this agreement (except to the Edison Company, and it shall only be more favorable to it in the matter of the payment of royalties to the Licensor), and in the case of the license to George Kleine it shall be so restricted as to prohibit said Kleine from manufacturing negative motion pictures in "the territory aforesaid," and from manufacturing from imported negative motion pictures positive motion pictures, and importing positive motion pictures in all more than three thousand "running feet of new subjects" per week: *Provided, however,* That if any of such additional nine licenses should be terminated during the continuance of this agreement, then and in each such case the Licensor may grant a license in writing to some other motion-picture manufacturer, but not on terms, conditions, or stipulations which are more favorable as to such new licensee than those set forth in this agreement.

It is further mutually covenanted and agreed by and between the Licensor and the Licensee that the Licensor will, during the continuance of this agreement, license such a number of persons, firms, or corporations under said Letters Patent Nos. 578185, 580749, 586093, 588916, 673329, 673892, 707934, 772382, 744251, 770937, 771280, 785205, and 785237, to make and sell exhibiting or projecting machines containing the inventions described and claimed in the same, capable of exhibiting or projecting motion pictures on film of a width greater than approximately one (1) inch, and also such machines not capable of exhibiting or projecting motion pictures on film of a greater width than approximately one (1) inch, as will be able to supply the demand for the same; and that it shall not, and it hereby covenants and agrees that it will not, during the continuance of this agreement, license any person, firm, or corporation under said letters patent or any of them to make or sell any such exhibiting or projecting machine containing any of the inventions described and claimed in said letters patent, and capable of exhibiting or projecting motion pictures on film of a width greater than approximately one (1) inch, except upon the conditions and restrictions that the sale and purchase of such machine gives only the right to use it solely for exhibiting or projecting motion pictures containing the inventions of said reassued Letters Patent No. 12192 issued by a licensee of the Licensor, while it owns or controls the letters patent under which such machine is licensed and upon other terms to be fixed by the Licensor while in use, and while the letters patent under which it is licensed are owned or controlled by the Licensor (which other terms shall only be the payment of a royalty or rental to the Licensor while in use, as hereinbefore provided for), and that there shall be attached to each such machine, in a conspicuous place, a plate, which is not to be removed therefrom, showing plainly not only the dates of the letters patent under which it is licensed, but also the aforesaid conditions or restrictions.

The Licensor further covenants and agrees that it will not charge any such person, firm, or corporation manufacturing and selling any such machine capable of exhibit-

ing or projecting motion pictures on a film of a width greater than approximately one (1) inch, more than five dollars (\$5) as a license fee for the sale of each such exhibiting or projecting machine sold by any such person, firm, or corporation.

The Licensor further covenants and agrees that it will not license any person, firm, or corporation to make or sell any exhibiting or projecting machine containing any of the inventions described and claimed in the aforesaid letters patent which is not capable of exhibiting or projecting motion pictures on film of a width greater than approximately one (1) inch, except upon the conditions and restrictions that such machine be used solely for exhibiting or projecting motion pictures on film not wider than approximately one (1) inch, in places where no admission fee is charged, and that there shall be attached to each such machine in a conspicuous place, a plate, which is not to be removed therefrom, showing plainly, not only the dates of the letters patent under which it is licensed, but also the aforesaid conditions or restrictions, and that the Licensor will not charge to any person, firm, or corporation making or selling any such machine a license fee of more than 5 per cent of the net retail selling price of each such machine.

The Licensor further covenants and agrees that it will grant a license to the Licensee, upon its request, to manufacture and sell exhibiting or projecting machines under the letters patent, and upon the condition as to the payment of the license fees or royalties and the other conditions and restrictions, as provided for in this paragraph, and will also grant similar licenses upon the same conditions as to the payment of the license fees or royalties and the other conditions and restrictions, to such of the additional licensees hereinbefore provided for who may request the same, except that the said American Mutoscope & Biograph Company is not to pay any such license fees or royalties; and will also grant a license to the Licensee and any such additional licensees who may request the same, to make and sell exhibiting or projecting machines under any other letters patent and containing the inventions described and claimed therein that the Licensor may here-

after acquire or control, upon the payment of additional license fees or royalties to be fixed by the Licensor, and subject to similar conditions and restrictions and the placing upon the machines of plates containing such conditions and restrictions as are provided for in this paragraph respecting exhibiting or projecting machines made and sold under the letters patent now owned by the Licensor mentioned in this paragraph, the royalty or license fee, and all other conditions and restrictions of such last-named licensees to be the same for the Licensee and such other licensees.

It is mutually covenanted and agreed, however, by and between the Licensor and Licensee that the Licensor shall have the right to grant, and that it will grant, licenses to persons, firms, and corporations upon their request (including the Licensee) to manufacture and sell exhibiting or projecting machines containing the inventions described and claimed in the aforesaid letters patent now owned by the Licensor, capable of exhibiting or projecting, by reflected light, animated pictures on film of any width, but not capable of exhibiting or projecting the same by transmitted light, upon the payment of a royalty or license fee not to exceed 5 per cent of the net retail selling price of each such machine, and upon the condition that they be used only in places where no admission fee is charged, which condition shall appear on a plate to be attached to each such machine; and also that it will grant licenses to such persons, firms, and corporations to manufacture and sell such exhibiting or projecting machines containing the inventions described and claimed in any letters patent that the Licensor may hereafter own or control, subject to similar conditions or restrictions and upon the payment of additional license fees or royalties to be fixed by the Licensor; the royalty or license fee, and all the conditions and restrictions of all such licensees, to be the same for the Licensee and such other licensees.

20a. It is further mutually covenanted and agreed by and between the Licensor and Licensee that in case the Licensor should be notified by the Licensee or it should otherwise come to its knowledge that any such additional

Licensee has knowingly or through gross neglect or carelessness broken, violated, or failed to perform any of the terms, conditions, or stipulations of the license granted by the Licensor, resulting in substantial injury to the Licensor, or the Licensee or the additional Licensees aforesaid, the Licensor will promptly notify such Licensee in writing of such breach, violation, or nonperformance, and if such Licensee should, for a period of forty (40) days after such notice, persist in or fail to correct, repair, or remedy the same, the Licensor shall at once terminate the license to such Licensee; and that in case any such Licensee should be guilty of a second grossly neglectful, careless, or knowing breach, violation, or nonperformance of such terms, conditions, or stipulations, resulting in substantial injury to the Licensor, or the Licensee or the additional Licensees aforesaid, then, and in such case, the Licensor shall terminate the license to such Licensee by giving the latter thirty (30) days' notice in writing of its intention so to do.

20b. The Licensor and Licensee further mutually covenant and agree that by the expression "motion pictures," as used in the foregoing agreement, is meant transparent or translucent tape-like film having photographs thereon of objects in motion.

21. It is further mutually covenanted and agreed by and between the Licensor and Licensee that unless sooner terminated, as hereinbefore or hereinafter provided, this agreement and the license granted thereby shall take effect January 1, 1909, and shall continue until June 20, 1910, but that the Licensee may renew this agreement and license thereafter from year to year upon the same terms, conditions, and stipulations as herein provided, by giving notice to the Licensor on or before April 20 of each year, beginning with the year 1910, of the Licensee's election to so renew this agreement and license, and upon the giving of each such notice this agreement and the license thereby granted shall be considered and treated by the Licensor and Licensee as renewed for a period of one year, beginning June 20 of the year following such notice, except that the last renewal

period shall be for the period from June 20, 1911, to August 20, 1915, the date of expiration of the Letters Patent No. 707094.

It is further mutually covenanted and agreed by and between the Licensor and Licensee that if, during said original term or during any such renewal period, either party should, knowingly or through gross neglect or carelessness, be guilty of a breach, violation, or nonperformance of its covenants, conditions, and stipulations, resulting in substantial injury to the other party, and should, for the period of forty (40) days after notice thereof from the other party, persist therein or fail to correct, repair, or remedy the same, then and in such case the party aggrieved may terminate this agreement by giving notice in writing to the guilty party of its intention so to do. It is, however, mutually covenanted and agreed by and between the Licensor and Licensee, that if the guilty party should correct, repair, or remedy such breach, violation, or nonperformance of its covenants, conditions, and stipulations within the said period of forty (40) days after such notice, and should thereafter knowingly or through gross neglect or carelessness be guilty of a second breach, violation, or nonperformance of its covenants, conditions, and stipulations, resulting in substantial injury to the other party, then and in such case, the party aggrieved may terminate this agreement by giving thirty (30) days' notice in writing to the guilty party of its intention so to do. Such termination of the agreement, however, shall not prejudice either party hereto in the recovery of damages because of any such breach, violation, or nonperformance by the other party hereto.

22. All notices provided for in this agreement shall be in writing and shall be given by delivering the same to the Licensor or Licensee, as the case may be, or to an officer of the Licensor or Licensee, as the case may be, or by depositing such notice, postage prepaid, in any post office of the United States, in a sealed envelope directed to the Licensor or the Licensee, as the case may be, at its last known post-office address, to be forwarded by registered mail.

23. It is mutually covenanted and agreed by and between the Licensor and Licensee that after notice of the termination

of this agreement and the license granted thereby by either party, as provided for in paragraphs 19 and 21 of this agreement, and after the same have been terminated, no matter what the cause or manner of termination may be, neither this license agreement, nor the fact that the Licensee has entered into or acted under it, shall be used in any manner, directly or indirectly, by or for the Licensor, its successors, assigns, or legal representatives, or by or for others with its or their consent or permission, against the Licensee, or the Licensee's successors or legal representatives, in any litigation, controversy, or proceeding involving the Licensee or them or any other persons, firms, or corporations, or in any other way, it being understood and agreed that upon such termination the positions and rights of the Licensor and Licensee shall be the same as if this agreement had not been made; provided, however, that the rights of neither party shall be prejudiced by such termination in the recovery of damages for any breach or other violation of this agreement by the other occurring prior to such termination.

In witness whereof the parties hereto have caused this agreement to be executed by their officers duly authorized to perform these acts, the day and year first above written.

[SEAL.]

MOTION PICTURE PATENTS COMPANY,

By FRANK L. DYER, President.

Attest:

GEORGE F. SCULL, Secretary.

[SEAL.] AMERICAN MUTOSCOPE AND BIOGRAPH COMPANY,

By J. J. KENNEDY, President.

Attest:

W. H. BRUNNER, Secretary.

EXHIBIT 4.

Form of License Agreement Between Motion Picture Patents Company and the Rental Exchanges.

EXCHANGE LICENSE AGREEMENT.

Whereas the Motion Picture Patents Company, of New York City (hereinafter referred to as the "Licensor") is the owner of all the right, title, and interest in and to reissued Letters Patent No. 12192, dated January 12, 1904, granted to Thomas A. Edison for kinetoscopic film, and also Letters Patent Nos. 578135, 550749, 586953, 538516, 673329, 673992, 707934, 722382, 744251, 776937, 771289, 755205, and 739297, for inventions relating to motion picture projecting machines; and

Whereas the Licensor has licensed the American Mutoscope and Biograph Company, of New York City; the Edison Manufacturing Company, of Orange, New Jersey; the Essanay Company, of Chicago; the Kalam Company, of New York City; George Kleine, of Chicago; Lubin Manufacturing Company, of Philadelphia; Pathe Freres, of New York City; the Selig Polyscope Company, of Chicago; and the Vitagraph Company of America, of New York City (hereinafter referred to as "Licensed Manufacturers or Importers"), to manufacture or import motion pictures under said reissued letters patent and to lease licensed motion pictures (hereinafter referred to as "Licensed Motion Pictures") for use on projecting machines licensed by the Licensor; and

Whereas the undersigned (hereinafter referred to as the "Licensee"), desires to obtain a license under said reissued Letters Patent No. 12192, to lease from the Licensed Manufacturers and Importers licensed motion pictures and to exhibit the said licensed motion pictures for use on projecting machines licensed by the Licensor;

Now, therefore, the parties hereto, in consideration of the covenants herein, have agreed as follows:

(1) The Licensor hereby grants to the Licensee for the term and subject to the conditions expressed in the "Conditions of license" hereinafter set forth, the license, under the said reissued Letters Patent No. 12192, to lease licensed motion pictures from the Licensed Manufacturers and Importers and to sublease said license motion pictures for use only on projecting machines licensed by the Licensor under letters patent owned by it.

(2) The Licensee covenants and agrees to conform with and strictly adhere to and be bound by all of the "Conditions of license," hereinafter set forth, and to and by any and all future changes in or additions thereto, and further agrees not to do or suffer any of the acts or things thereby prohibited, and that the Licensor may place and publish the Licensee's name in its removal or suspended list in the event of the termination of this agreement by the Licensor, or in case of any violation thereof, and may direct the Licensed Manufacturers and Importers not to lease licensed motion pictures to the Licensee, the Licensee hereby expressly agreeing that such Licensed Manufacturers and Importers shall have the right to cease such leasing when so directed by the Licensor; and the Licensee further agrees that the signing of this agreement constitutes a cancellation of any or all agreements for the sale of licensed motion pictures made prior to this agreement by and between the Licensee and any or all licensed manufacturers or importers, except as to any clause in said agreements relating to the return of motion-picture film to the several licensed manufacturers or importers. It is further understood and agreed by the Licensee that the license hereby granted is a personal one and not transferable or assignable, and the Licensee hereby recognizes and acknowledges the validity of the said reissued Letters Patent No. 12192.

CONDITIONS OF LICENSE.

1. From the date of this agreement the Licensee shall not buy, lease, rent, or otherwise obtain any motion pictures other than licensed motion pictures and shall dispose of any motion pictures only by the subleasing thereof under the conditions hereinafter set forth.

2. The ownership of such licensed motion picture leased under this agreement shall remain in the Licensed Manufacturer or Importer from whom it may have been leased, the Licensee, by the payment of the leasing price requiring only the license to sublet such motion picture subject to the conditions of this agreement. Such license for any motion picture shall terminate upon the breach of this agreement in regard thereto, and the Licensed Manufacturer or Importer from whom it may have been leased shall have the right to immediate possession of such motion picture, without liability for any leasing price or other sum which the Licensee or the person in whose possession said motion picture is found may have paid therefor.

3. The Licensee shall not sell nor exhibit licensed motion pictures obtained from any Licensed Manufacturer or Importer, either in the United States or elsewhere, but shall only sublet such licensed motion pictures and only for use in the United States and its Territories and only to exhibitors who shall exclusively exhibit licensed motion pictures, but in no case shall the exhibitor be permitted to sell or sublet or otherwise dispose of said licensed motion pictures.

4. The leasing price to be paid by the Licensee to the Licensed Manufacturers or Importers, or the terms of payment for or shipment of licensed motion pictures, shall in no case be less or more favorable to the Licensee than that defined in the leasing schedule embodied in this agreement, or any other substitute leasing schedule, which may be regularly adopted by the Licensor, and of which notice shall be given to the Licensee hereafter.

5. To permit the Licensee to take advantage of any standing order leasing price mentioned in such schedule, such standing order with any Licensed Manufacturer or

Importer shall be for one or more prints of each and every subject regularly produced, and offered for lease by such manufacturer or importer as a standing order subject and not advertised as special by such Licensed Manufacturer or Importer; and shall remain in force for not less than fourteen (14) consecutive days. Any standing order may be canceled or reduced by the Licensee on fourteen (14) days' notice. Extra prints in addition to a standing order shall be furnished to the Licensee at the standing order leasing price.

6. The Licensee shall not sell, rent, or otherwise dispose of, either directly or indirectly, any licensed motion pictures (however the same shall have been obtained) to any persons, firms or corporations or agents thereof, who may be engaged either directly or indirectly in selling or renting motion picture films.

7. The Licensee shall not make or cause to be made, or permit others to make, reproductions or so-called "duplicates" of any licensed motion pictures, nor sell, rent, loan, or otherwise dispose of or deal in any reproductions or "duplicates" of any motion pictures.

8. The Licensee shall not deliberately remove the trademark or trade name or title from any licensed motion picture, nor permit others to do so, but in case any title is made by the Licensee, the manufacturer's name is to be placed thereon, provided that in making any title by the Licensee the manufacturer's trademark shall not be reproduced.

9. The Licensee shall return to each licensed manufacturer or importer (without receiving any payment therefor, except that the said Licensed Manufacturer or Importer shall pay the transportation charges incident to the return of the same) on the first day of every month commencing seven months from the first day of the month on which this agreement is executed, an equivalent amount of positive motion-picture film in running feet (not purchased or leased over twelve months before) and of the make of the said Licensed Manufacturer or Importer, equal to the amount of licensed motion pictures that was so leased during the seventh month preceding the day of each such return, with the exception, however, that where

any such motion pictures are destroyed or lost in transportation or otherwise, and satisfactory proof is furnished within fourteen (14) days after such destruction or loss, to the Licensed Manufacturer or Importer from whom such motion picture was leased, the Licensed Manufacturer or Importer shall deduct the amount so destroyed or lost from the amount to be returned.

10. The Licensee shall not sell, rent, sublet, loan, or otherwise dispose of any licensed motion pictures (however the same may have been obtained) to any person, firm, or corporation in the exhibition business who may have violated any of the terms or conditions imposed by the Licensor through any of its licensees and of which violation the present Licensee may have had notice.

11. The Licensee shall not sublease licensed motion pictures to any exhibitor unless a contract with said exhibitor (satisfactory in form to the Licensor) is first executed, under which the exhibitor agrees to conform to all the conditions and stipulations of the present agreement applicable to the exhibitor; and in the case of an exhibitor who may operate more than a single place of exhibition, a similar contract shall be executed in connection with each place so operated, and supplied with licensed motion pictures by the Licensee.

12. After February 1, 1930, the Licensee shall not sublease any licensed motion pictures to any exhibitor unless each motion picture projecting machine on which the licensed motion pictures are to be used by such exhibitor is regularly licensed by the Motion Picture Patents Company, and the license fees therefor have been paid; and the Licensee shall, before supplying such exhibitor with licensed motion pictures, mail to the Motion Picture Patents Company, at its office in New York City, a notice, giving the name of the exhibitor, the name and location of the place of exhibition (and, if requested to do so by the Licensor, its seating capacity, hours of exhibition, and price of admission, and the number and make of the licensed projecting machine or machines), together with the date of the commencement of the subleasing, all in a form approved by the Licensor. The Licensee, when properly notified by the Licensor that the

license fees of any exhibitor for any projecting machine have not been paid, and that the license for such projecting machine is terminated, shall immediately cease to supply such exhibitor with licensed motion pictures.

13. The Licensee agrees to order during each month while this agreement is in force, for shipment directly to the place of business of the Licensee in the city for which this agreement is signed, licensed motion pictures, the net leasing price for which shall amount to at least \$2,500.

14. The Licensee shall, on each Monday during the continuance of this agreement, make or mail payment to each Licensed Manufacturer and Importer for all invoices for licensed motion pictures which have been received by the Licensee during the preceding week.

15. This agreement shall extend only to the place of business for the subleasing of motion pictures maintained by the Licensee in the city for which this agreement is signed, and the Licensee agrees not to establish or maintain a place of business for the subleasing of motion pictures, or from which motion pictures are delivered to exhibitors, in any other city, unless an agreement for such other city, similar to the present agreement, is first entered into by and between the Licensee and the Licensor.

16. The Licensor agrees that before licensing any person, firm, or corporation in the United States (not including its insular territories or possessions and Alaska) to lease licensed motion pictures from Licensed Manufacturers and Importers and to sublease such motion pictures it will exact from each such Licensee an agreement similar in terms to the present agreement, in order that all Licensees who may do business with the Licensed Manufacturers and Importers will be placed in a position of exact equality.

19. It is understood and specifically covenanted by the Licensee that the Licensor may terminate this agreement on fourteen (14) days' written notice to the Licensee of its intention so to do, and that if the Licensee shall fail to faithfully keep and perform the foregoing terms and conditions of lease, or any of them, or shall fail to pay the leasing

price for any motion pictures supplied by any Licensed Manufacturer or Importer when due and payable, according to the terms of this agreement, the Licensor shall have the right to place the Licensee's name on an appropriate suspended list, which the Licensor may publish and distribute to its other licensees and to exhibitors and to the Licensed Manufacturers and Importers and to direct the Licensed Manufacturers and Importers not to lease licensed motion pictures to the Licensee, and the exercise of either or both of these rights by the Licensor shall not be construed as a termination of this license, and the Licensor shall also have the right in such case, upon appropriate notice to the Licensee, to immediately terminate the present license, if the Licensee shall so elect, without prejudice to the Licensor's right to sue for and recover any damages which may have been suffered by such breach or noncompliance with the terms and conditions hereof by the Licensee, such breach or noncompliance constituting an infringement of said released letters patent. It is further agreed by the Licensee that if this agreement is terminated by the Licensor for any breach of any condition hereof, the right to possession of all licensed motion pictures shall revert, twenty days after notice of such termination, to the respective Licensed Manufacturers and Importers from whom they were obtained and shall be returned to such Licensed Manufacturers or Importers at once after the expiration of that period.

20. It is understood that the terms and conditions of this license may be changed at the option of the Licensor upon fourteen (14) days' written notice to the Licensee, but no such change shall be effective and binding unless duly ratified by an officer of the Licensor.

LEASING PRICES OF LICENSED POSITIVE MOTION PICTURES.

List.....	Cents per running foot.
Standing order.....	18
Films leased between two and four months after release date.....	11
Films leased between four and six months after release date.....	9
Films leased over six months after release date.....	7
	6

A rebate of 10 per cent will be allowed on all lenses of licensed motion pictures, except at the 7-cent and 5-cent prices, which are net; said rebates to be due and payable between the 1st and 15th days of each of the months of March, May, July, September, November, and January on all films leased during the two months preceding each said period, provided all the terms and conditions of this license agreement have been faithfully observed.

TERMS.

All shipments are made f. o. b. lessor's office at lessee's risk.

All motion-picture films are to be shipped to lessee's office only.

The lengths at which motion-picture films are listed and leased are only approximate.

MOTION PICTURE PATENTS COMPANY,
By _____, President.

Place of business for which this license is granted:
Street and No. _____
City _____, State _____

Date _____

EXHIBIT 5.

License Agreement Under the Exhibiting Machine Patents, Between Motion Picture Patents Company and Armat Moving Picture Company.

(a) This agreement made this 7th day of January, 1909, by and between the Motion Picture Patents Company, a corporation organized and existing under the laws of the State of New Jersey, and having an office at Jersey City, in said State, party of the first part (hereinafter referred to as the "Licensor"), and Armat Moving Picture Company, a corporation organized and existing under the laws of the State of West Virginia, and having an office at Washington, D. C., party of the second part (hereinafter referred to as the "Licensee");

(b) Whereas the Licensor represents that it is the owner of the entire right, title, and interest in and to letters patent of the United States:

- No. 578185, dated March 2, 1897, for vitascope, granted to Thomas Armat;
- No. 580749, dated April 13, 1897, for vitascope, granted to Thomas Armat;
- No. 583953, dated July 29, 1897, for phantoscope, granted to Charles F. Jenkins and Thomas Armat;
- No. 588816, dated August 24, 1897, for kinetoscope, granted to Charles M. Campbell as the assignee of Willard G. Steward and Ellis F. Frost;
- No. 673323, dated April 30, 1901, for kinetoscope, granted to the American Vitograph Company as the assignee of Albert E. Smith;
- No. 673892, dated May 14, 1901, for vitascope, granted to Thomas Armat;
- No. 707934, dated August 26, 1902, for projecting kinetoscope, granted to E. & H. T. Anthony & Co., as assignees of Woodville Latham;

No. 722382, dated March 10, 1903, for animated picture apparatus, granted to American Mutoscope & Biograph Company as the assignee of John A. Press;

No. 744251, dated November 17, 1903, for kinetoscope, granted to Albert E. Smith;

No. 770937, dated September 27, 1904, for kinetoscope, granted the Vitaphone Company of America as the assignee of Albert E. Smith;

No. 771280, dated October 4, 1904, for winding reel, granted Albert E. Smith;

No. 785205, dated March 21, 1905, for flame-shield for kinetoscopes, granted the Vitaphone Company of America as the assignee of William Ellwood; and

No. 785237, dated March 21, 1905, for film-holder for kinetoscopes, granted the Vitaphone Company of America as the assignee of Albert E. Smith;

all of which said letters patent relate to improvements on the motion-picture art, and that there are no outstanding licenses, shop rights, or other rights under said letters patent, or either of them, except a license for parlor kinetoscopes, granted the Karmata Company, of Washington, D. C., under Letters Patent Nos. 878185, 580749, 586953, and 673992, and certain alleged licenses under U. S. Letters Patent No. 586953, which are in dispute, claimed to be owned by the Edison Company and the American Graphophone Company, of Washington, D. C., and S. Lubin, of Philadelphia, Pennsylvania; and excepting a license granted by the American Mutoscope & Biograph Company to the firm of Marvin and Casler to manufacture and sell cameras and exhibiting or projecting machines under letters patent owned by it (some of which are heretofore referred to) for use in foreign countries only and excepting certain licenses granted by the Licensee to the American Mutoscope & Biograph Company under Letters Patent Nos. 878185, 580749, 586953, 588918, and 673992, and by the American Mutoscope & Biograph Company to the Licensee under patents Nos. 707034 and 722382, which licenses are, however, by agreement between said parties, suspended and are not to

be acted upon until the Licensor becomes bankrupt, ceases doing business or shall be dissolved voluntarily or otherwise, or its charter shall be repealed; and

(o) Whereas the Licensor represents further that it is the owner of the entire right, title, and interest in and to reissued Letters Patent of the United States Numbered 12192, dated January 12, 1904, the original letters patent of which were numbered 589168, and dated August 31, 1897, and that it has granted licenses under the said reissued letters patent only to the following-named persons, firms, or corporations:

American Mutoscope & Biograph Company of New York City;
Edison Manufacturing Company of Orange, N. J.;
Essanay Company of Chicago, Illinois;
Kalem Company of New York City;
George Kleine of Chicago, Illinois;
Lubin Manufacturing Company of Philadelphia, Pa.;
Pathe Freres of New York City;
Selig Polyscope Company of Chicago, Illinois;
The Vitaphone Company of America of New York City;

and that all of the said persons, firms, or corporations have covenanted and agreed to lease only and not sell in the United States, its Territories and possessions except its insular possessions and Alaska (hereinafter referred to as the "lease territory aforesaid"), motion picture films manufactured or imported by them, of a width greater than approximately one inch (1"), and under the condition and restriction that the said films shall be used only on exhibition or projecting machines licensed by the Licensor under United States letters patent owned by the Licensor; and

(p) Whereas the Licensee is engaged in the manufacture and sale of motion picture exhibiting and projecting machines, and relying upon the representation of the Licensor and induced thereby, desires to obtain from the Licensor a license under the said United States Letters Patent;

(q) Now, therefore, the parties hereto, for and in consideration of the sum of one dollar to each in hand paid by

the other, and for other good and valuable considerations, from each to the other moving, receipt of all of which is hereby acknowledged, have agreed as follows:

(1) The Licensor hereby grants to the Licensee for the term and subject to the covenants, conditions, and stipulations hereinafter expressed, the right and license for the United States, its territories and possessions, to manufacture and sell, motion picture exhibiting or projecting machines embodying one or more of the inventions described and claimed in the said United States Letters Patent Nos. 578185, 580749, 589953, 588916, 673329, 673992, 707934, 722382, 744251, 770937, 771280, 785205, and 785237. The license hereby granted is personal to the Licensee, and in the event of the permanent discontinuance or retirement from business of the Licensee for a period of six consecutive months, the license hereby granted shall be immediately terminated.

(2) The Licensor, for itself, its successors, assigns, and legal representatives, hereby releases, acquits, and discharges the Licensee from any and all claims, demands, and liability for profits and damages because of any infringement by the Licensee of one or more of the said United States Letters Patent Nos. 578185, 580749, 589953, 588916, 673329, 673992, 707934, 722382, 744251, 770937, 771280, 785205, and 785237, or use by the Licensee of the inventions covered thereby.

(3) The Licensee hereby recognizes and admits the validity of each and all of the said United States Letters Patent Nos. 578185, 580749, 589953, 588916, 673329, 673992, 707934, 722382, 744251, 770937, 771280, 785205, and 785237, and the Licensee agrees not to contest or question the same during the continuance of this agreement.

(4) The Licensee covenants and agrees that on all motion picture exhibiting or projecting machines containing one or more of the inventions described and claimed in the said United States Letters Patent Nos. 673329, 744251, 770937, 771280, 785205, and 785237, made in the United States, its Territories and possessions, by the Licensee, and sold after the license hereby granted shall take effect and during the

continuance of this agreement, the Licensee will pay royalties as follows:

On each such machine capable of exhibiting or projecting by transmitted light, motion pictures on film of a width greater than approximately one inch (1"), a royalty of one dollar (§1).

On each such machine not capable of exhibiting or projecting by transmitted light, motion pictures on film of a width greater than approximately one inch (1"), a royalty of three-fifths (3-5) of one (1) per cent of the net retail selling price of such machines.

On each such machine capable of exhibiting or projecting by reflected light, motion pictures on film of any width, but not capable of exhibiting or projecting the same by transmitted light, a royalty of three-fifths (3-5) of one (1) per cent of the net retail selling price of such machine.

It is understood and agreed by and between the Licensor and the Licensee that the expression "motion picture exhibiting or projecting machine," as used hereinbefore or hereinafter, includes motion-picture mechanisms or "heads" for such exhibiting or projecting machines, but not any repair parts or portions of such motion-picture mechanisms or "heads."

The Licensee further covenants and agrees that the Licensee will, within fifteen (15) days after the last days of the months of November, February, May, and August in each year, after this agreement takes effect and during its continuance, submit a statement in writing signed by the proper officer of the Licensee, and sworn to if requested by the Licensor, showing the number of exhibiting or projecting machines of each of the classes provided for in this paragraph, embodying one or more of the inventions described and claimed in the said United States Letters Patent Nos. 673329, 744251, 770937, 771280, 785205, and 785237, sold by the Licensee during the three months ending with the last days of the said months, and at the same time pay the royalties due thereon. The first such statement and payment, however, shall be only for the period between February 1, 1909, and February 28, 1909. The Licensee further agrees

to keep accurate books of account and to permit the Licensor to determine through Messrs. Price, Waterhouse & Company, or any other reputable chartered accountants to be agreed upon by the parties hereto, the number of such exhibiting or projecting machines sold by the Licensee while this agreement is in effect, if the Licensor should so desire.

(5) The Licensee further covenants and agrees that each and every motion picture exhibiting or projecting machine capable of exhibiting or projecting by transmitted light, motion pictures on a film of a width greater than approximately one inch (1"), and embodying one or more of the inventions described and claimed in the said United States Letters Patent Nos. 578185, 580749, 586053, 588916, 673329, 675092, 707034, 722352, 744251, 770937, 771250, 785205, 786037, 771250, 785205, and 785297; and made in the United States, its Territories and possessions by the Licensee, shall be sold by the Licensee, except when sold for export, under the restriction and condition that such exhibiting or projecting machines, shall be used solely for exhibiting or projecting motion pictures containing the invention of reissued Letters Patent No. 12102, leased by a Licensee of the Licensor while it owns said patents, and upon other terms to be fixed by the Licensor and complied with by the user while the said machine is in use and while the Licensor owns said patents (which other terms shall only be the payment of a royalty or rental to the Licensor while in use). The Licensor further covenants and agrees that the Licensee will attach in a conspicuous place to each and every such exhibiting or projecting machine of the Licensee's manufacture, sold by the Licensee, except for export, after the date hereof, a plate showing plainly not only the dates of the letters patent under which the said machine is licensed, but also the following words and figures:

Patented.

Serial No:

No.

The sale and purchase of this machine gives only the right to use it solely with moving pictures containing the invention of reissued patent No. 12102, leased by a Licensee

of the Motion Picture Patents Company, the owner of the above patents and reissued patent, while it owns said patents, and upon other terms to be fixed by the Motion Picture Patents Company and complied with by the user while it is in use and while the Motion Picture Patents Company owns said patents. The removal or defeasement of this plate terminates the right to use this machine.

(6) The Licensee further covenants and agrees that each and every motion picture exhibiting or projecting machine not capable of exhibiting or projecting by transmitted light, motion pictures on a film of a width greater than approximately one inch (1"), or capable of exhibiting or projecting motion pictures on film of any width, but only with reflected light, and embodying one or more of the inventions described and claimed in the said Letters Patent Nos. 578185, 580749, 586053, 588916, 673329, 675092, 707034, 722352, 744251, 770937, 771250, 785205, and 785297; and made in the United States, its Territories and possessions by the Licensee, shall be sold by the Licensee, except when sold for export, under the restrictions and condition that the said exhibiting or projecting machine shall be used in exhibiting or projecting motion pictures only in places to which no admission fee is charged. The Licensee further covenants and agrees that the Licensee will attach in a conspicuous place to each and every such exhibiting or projecting machine of the Licensee's manufacture, sold by the Licensee, except for export, after the date hereof, a plate showing plainly not only the dates of the Letters Patent under which the said machine is licensed, but also the following words and figures:

Patented

No.

The sale and purchase of this machine gives only the right to use it so long as this plate is not removed or defaced and in places to which no admission fee is charged.

(7) The Licensee further covenants and agrees that to each and every motion-picture exhibiting or projecting machine of any kind, embodying one or more of the inventions described and claimed in the said United States Letters

Patent Nos. 578185, 580749, 580603, 588916, 673329, 673902, 707934, 722382, 744251, 770937, 771280, 785205, and 785237, and made in the United States, its Territories and possessions by the Licensee, when sold bona fide for export, there shall be attached a plate showing plainly not only the dates of the letters patent under which the said machine is licensed, but also the following words and figures:

Patented

No.

Not licensed for use in the United States, its Territories and possessions (except its insular possessions and Alaska).

It is understood by and between the parties hereto that by "export sales" is meant all sales for delivery outside of the "lease territory aforesaid," when the machine, addressed to the purchaser, agent, or consignee, is delivered to the vessel or to a transportation company for transportation outside of the said "lease territory aforesaid," and not otherwise.

(8) The Licensee further covenants and agrees that the Licensee will not, during the continuance of this agreement, make or sell repair parts for motion-picture exhibiting or projecting machines which have been manufactured or imported and sold by any other person, firm, or corporation, who or which is licensed by the Licensor to manufacture or import and sell motion-picture exhibiting or projecting machines under any or all of the said United States Letters Patent Nos. 578185, 580749, 580603, 588916, 673329, 673902, 707934, 722382, 744251, 770937, 771280, 780205, and 785237, when such repair parts constitute any part of any invention described and claimed in the said United States letters patent.

(9) The Licensee further covenants and agrees that the Licensee will not sell any exhibiting or projecting machine which the Licensee is hereby licensed to manufacture at less than the Licensee's list price for such machine, except to jobbers, and to other persons, firms, and corporations for the purpose of resale, and that the Licensee will require such jobbers and other persons, firms, and corporations to sell

such machines at not less than the Licensee's list price for such machine. Nothing in this paragraph shall prohibit, however, the allowance of two per cent (2%) discount from list price for ten days cash payments.

(10) The Licensee further covenants and agrees that the Licensee will not sell, after May 1, 1909, during the continuance of this agreement, any exhibiting or projecting machine which the Licensee is hereby licensed to manufacture, capable of exhibiting or projecting by transmitted light, motion pictures on film of a width greater than approximately one inch (1"), at a less list price than one hundred and fifty dollars (\$150), which list price may include the machine head, stereoscopic attachment, film magazine, lamp house, are lamp, rheostat, switch and switch box, and attaching cords, except, however, that for the last five named items may be substituted a gas burner and gas making outfit. It is further understood and agreed that such complete machines may be sold between February 1, 1909, and May 1, 1909, at a less list price than one hundred and fifty dollars (\$150), but only to persons, firms, or corporations not engaged in the business of renting motion picture films, and not for use in any permanent or fixed place of exhibition.

(11) It is further mutually covenanted and agreed by and between the Licensor and Licensee that the Licensor may grant other licenses to manufacture or import and sell motion picture exhibiting or projecting machines under any or all of the said United States Letters Patent Nos. 578185, 580749, 580603, 588916, 673329, 673902, 707934, 722382, 744251, 770937, 771280, 785205, and 785237, said licenses to be in writing, and not to be granted or continued under terms, conditions, or stipulations which are in any respect more favorable to the Licensees named therein than those set forth in this agreement (except to the American Muscope & Biograph Company of New York City, which is to pay no royalties on any exhibiting or projecting machines embodying any or all of the inventions described and claimed in the aforesaid Letters Patent Nos. 578185, 580749, 580603, 588916, 673902, 707934, and 722382, and to the Edison

Manufacturing Company, of Orange, New Jersey, and the firm of Marvin and Casler, of Canastota, New York, neither of which is to pay any royalties on any exhibiting or projecting machines embodying any or all of the inventions described and claimed in the aforesaid Letters Patent Nos. 573185, 580749, 586953, 588916, 673092, 707034, and 722382, when such exhibiting or projecting machines are sold bona fide for export, the covenants and conditions in the licenses to each and all of the said firms or corporations to be otherwise like those set forth in this agreement).

(12) It is mutually covenanted and agreed by and between the Licensor and Licensee that, unless sooner terminated, as hereinbefore and hereinafter provided, this agreement, and the license granted thereby, shall take effect on February 1, 1909, and shall continue until June 20, 1910, but that the Licensee may renew this agreement and license thereafter from year to year upon the same terms, conditions, and stipulations as hercin provided, by giving notice to the Licensor on or before the 20th day of March in each year, beginning with the year 1910, of the Licensee's election to so renew this agreement and license, and upon the giving of each such notice this agreement and the license thereby granted shall be considered and treated by the Licensor and Licensee as renewed for the period of one year, beginning June 20th of the year following such notice, and such notice and renewal may be given and made by the Licensee during the life or lives of each or all of the patents under which the Licensee is hereby licensed.

In case, however, that the Licensor should become bankrupt, cease doing business, or should be dissolved, voluntarily or otherwise, or its charter should be repealed, then, on the happening of either of such events, this agreement and the agreements made with the additional Licensee hereinbefore provided for, that are then in force, shall forthwith terminate and be at an end.

(13) It is further mutually covenanted and agreed by and between the Licensor and Licensee, that if, during said original term or during any such renewal period, either

party should, knowingly or through gross neglect or carelessness, be guilty of a breach, violation, or nonperformance of its covenants, conditions, and stipulations resulting in substantial injury to the other party, and should, for the period of forty (40) days after notice thereof from the other party persist therein or fail to correct, repair, or remedy the same, then and in such case the party aggrieved may terminate this agreement by giving notice in writing to the guilty party of its intention so to do. It is, however, mutually covenanted and agreed by and between the Licensor and Licensee that if the guilty party should correct, repair, or remedy such breach, violation, or nonperformance of its covenants, conditions, and stipulations within the said period of forty (40) days after such notice, and should thereafter knowingly or through gross neglect or carelessness be guilty of a second breach, violation, or nonperformance of its covenants, conditions, and stipulations, resulting in substantial injury to the other party, then and in such case, the party aggrieved may terminate this agreement by giving thirty (30) days' notice in writing to the guilty party of its intention so to do. Such termination of the agreement, however, shall not prejudice either party hereto in the recovery of damage because of any such breach, violation, or nonperformance by the other party hereto.

(14) All notices provided for in this agreement, shall be in writing and shall be given by delivering the same to the Licensor or Licensee, as the case may be, or by depositing such notices, postage prepaid, in any post office of the United States, in a sealed envelope directed to the Licensor or Licensee, as the case may be, at its last known post-office address, to be forwarded by registered mail.

(15) It is mutually covenanted and agreed by and between the Licensor and Licensee that after notice of the termination of this agreement and the license granted thereby by either party, as provided for in paragraph 12 of this agreement, and after the same have been terminated, no matter what the cause or manner of termination may be, neither this license agreement, nor the fact that the Licensee has entered into

or acted under it, shall be used in any manner, directly or indirectly, by or for the Licensor, its successors, assigns or legal representatives or by or for others with its or their consent or permission, against the Licensee, or the Licensee's successors or legal representatives, in any litigation, controversy or proceeding involving the Licensee, or them or any other persons, firms or corporations, or in any other way, it being understood and agreed that upon such termination the positions and rights of the Licensor and Licensee shall be the same as if this agreement had not been made; *provided, however*, that the rights of neither party shall be prejudiced by such termination in the recovery of damages for any breach or other violation of this agreement by the other occurring prior to such termination.

In witness whereof, the parties hereto have caused this agreement to be executed by their officers duly authorized to perform those acts, the day and year first above written.

MOTION PICTURE PATENTS COMPANY,
By FRANK L. DYER, *President*,
ARMAT MOVING PICTURE COMPANY,
By THOS. ARMAT, *President*.

Attest:

GEORGE F. SCULL, *Secretary*.

Attest:

LOUIS H. STANLEY, *Secretary*.

EXHIBIT 6.

Charter of General Film Company, April 18, 1910.

STATE OF MAINE:

Certificate of organization of a corporation under the general law.

The undersigned, officers of a corporation organized at Portland, Maine, at a meeting of the signers of the articles of agreement therefor, duly called and held at No. 95 Exchange Street, in the city of Portland, State of Maine, on Monday, the eighteenth day of April, A. D. 1910, hereby certify as follows:

The name of said corporation is General Film Company.

The purposes of said corporation are—
For the purpose of buying, selling, or otherwise acquiring or disposing of letters patent and licenses under letters patent for inventions pertaining to the production and use of photographic or other negatives and photographic or other positives, of objects at rest and objects in motion; manufacturing, buying, using, selling, or otherwise acquiring or disposing of, or leasing, apparatus, materials, processes, and rights, pertaining to the production and use of photographic or other negatives and photographic or other positives, of objects at rest and objects in motion; manufacturing, buying, using, selling, or otherwise acquiring or disposing of, or leasing, apparatus and materials of every character used in exhibitions, entertainments, motion-picture shows and theatrical performances, and in equipping theaters, halls, and similar

places of amusement, entertainment, and instructions; purchasing and holding such real and personal property necessary for or incidental to the purposes of this company, or any of them; mortgaging, leasing, selling, or disposing of by agreement or otherwise, and conveying, any and all of the real or personal property of the corporation; buying or otherwise acquiring and holding, selling, or otherwise disposing of, the stocks, bonds, notes, and other evidences of indebtedness of any domestic or foreign corporation, and issuing and delivering its stock, bonds, or other obligations in payment or exchange for stock, bonds, and other obligations of other corporations organized for purposes similar to the purposes of this corporation or conducting a business similar to that herein provided for or capable of being conveniently carried on in connection with the business above described; conducting its business in all its branches, and having one or more offices; holding, leasing, or conveying real or personal property in all States and in all foreign countries to which the business of the company may be extended, and borrowing money and doing any acts to protect and improve the business of the corporation and enhance the value of its property.

To issue any and all bonds necessary to the business of the corporation, and to secure the same by mortgage, deed of trust, or any other form of conveyance; to issue as preferred stock such part of its capital stock as shall be fixed and determined in the by-laws; to acquire and undertake the whole or any part of the business, property, assets, and liabilities of any person, firm, or corporation engaged in a business similar to that herein provided for, or capable of being conveniently carried on in connection with the business above described; to do all or any part of the above things as principals, agents, contractors, or otherwise, and by or through agents, or otherwise, and either alone or in conjunction with others; and to do any and all things incidental to the prosecution of the purposes herein contained, or any of them, and not inconsistent with the laws of the State of Maine.

The amount of capital stock is two million (\$2,000,000) dollars.

The amount of preferred stock is one million five hundred thousand (\$1,500,000) dollars.

The amount of common stock is five hundred thousand (\$500,000) dollars.

The amount of capital stock already paid in is eleven thousand four hundred (\$11,400) dollars.

The par value of the shares is one hundred (\$100) dollars each.

The names and residences of the owners of said shares are as follows:

Names.	Residences.	Preferred.	Common.
Frank L. Dyer.....	Montclair, N. J.....	5
J. A. Berst.....	New York City.....	1
Gaston Melles.....	New York City.....	1
William M. Selig.....	Chicago, Ill.....	1
Samuel Long.....	Hoboken, N. J.....	1
Siegmund Lubin.....	Philadelphia, Pa.....	1
J. J. Kennedy.....	New York City.....	1
William T. Rock.....	New York City.....	1
George K. Spoor.....	Chicago, Ill.....	1	5
Biograph Company.....	Hoboken, N. J.....	2	100
		9	105

leaving in the treasury, unsubscribed for 19,886 shares, of which 14,991 are preferred and 4,895 are common.

Said corporation is located at Portland, in the county of Cumberland.

The number of directors is ten and their names are Frank L. Dyer, J. A. Berst, Gaston Melles, William M. Selig, Siegmund Lubin, Samuel Long, J. J. Kennedy, William T. Rock, George K. Spoor, and George K. Spoor.

The name of the clerk is L. L. Hight and his residence is Portland, Maine.

The undersigned, J. J. Kennedy, is president; the undersigned J. A. Berst, is treasurer, and the undersigned, J. J. Kennedy, J. A. Berst, George Kleine, Samuel Long, Siegmund Lubin, W. M. Selig, Gaston Melles, and William T. Rock are a majority of the directors of said corporation.

Witness our hands this eighteenth day of April, A. D. 1910.

J. J. KENNEDY,

President.

J. A. BERST,

Treasurer.

J. J. KENNEDY,
J. A. BERST,
GEORGE KLEINE,
SAMUEL LONG,
SIEGMUND LUBIN,
W. M. SELIG,
GASTON MELLES,
WM. T. ROCK,

Directors.

STATE OF MAINE,

Cumberland, ss:

PORTLAND, MAINE, April 15, 1910.

Then personally appeared J. J. Kennedy, J. A. Berst, George Kleine, Samuel Long, Siegmund Lubin, Wm. M. Selig, Gaston Melles, and William T. Rock, and severally made oath to the foregoing certificate, that the same is true.

Before me,

HARRY P. SWEETSER,
Justice of the Peace.

STATE OF MAINE,
ATTORNEY GENERAL'S OFFICE,
April 20, 1910.

I hereby certify that I have examined the foregoing certificate, and the same is properly drawn and signed, and is conformable to the constitution and laws of the State.

CHARLES P. BARNES,
Asst. Attorney General.

(Endorsed:) Copy. (Name of corporation) General Film Company. Cumberland, SS. Registry of Deeds. Received April 21, 1910, at 10 h. 5 m. a. m. Recorded in vol. 42, page 69. Attest: Frank L. Clark, Register. A true copy of record. Attest: Frank L. Clark, Register. State of Maine. Office of Secretary of State. Augusta, April 21, 1910. Received and filed this day. Attest: A. L. Brown, Secretary of State. Recorded in vol. 73, page 309.

55498-12-14

EXHIBIT 7.

**Agreement Between Motion Picture Patents
Company and General Film Company,
April 21, 1910.**

1. This agreement, made this 21st day of April, 1910, by and between the Motion Picture Patents Company, a corporation organized and existing under the laws of the State of New Jersey, and having an office in the city, county, and State of New York, party of the first part (hereinafter referred to as the Licensor), and the General Film Company, a corporation organized and existing under the laws of the State of Maine, and having an office in said city of New York, party of the second part (hereinafter referred to as the Licensee), witnesseth that:

2. Whereas the Licensor represents that it is organized to own, deal in, and grant licenses under letters patent pertaining to the motion-picture art, and that it is the owner of all the right, title, and interest in and to the following United States Letters Patent relating to that art—

No. 578185, dated March 2, 1897, for vitascope, granted to Thomas Armat.

No. 580749, dated April 13, 1897, for vitascope, granted to Thomas Armat.

No. 580933, dated July 20, 1897, for phonoscopes, granted to Charles F. Jenkins and Thomas Armat.

No. 588916, dated August 24, 1897, for kinetoscope, granted to Charles M. Campbell, as the assignee of Willard G. Steward and Ellis F. Frost.

No. 629363, dated July 13, 1899, for kinetoscopic camera, granted to American Kinetoscope Company as the assignee of Herman Casler.

No. 673229, dated April 30, 1901, for kinetoscope, granted to The American Vitagraph Company as the assignee of Albert E. Smith.

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ORIGINAL PETITION, EXHIBIT 7.

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No. 673995, dated May 14, 1901, for vitascope, granted to Thomas Armat.

No. 707394, dated August 26, 1902, for projecting kinetoscope, granted E. & H. T. Anthony & Co., as assignees of Woodville Latham.

No. 722839, dated March 10, 1903, for animated-picture apparatus, granted to American Mutoscope and Biograph Company as the assignee of John A. Pross;

No. 744251, dated November 17, 1903, for kinetoscope, granted Albert E. Smith;

No. 770937, dated September 27, 1904, for kinetoscope, granted the Vitagraph Company of America as the assignee of Albert E. Smith;

No. 771280, dated October 4, 1904, for winding reel, granted Albert E. Smith;

No. 785205, dated March 21, 1905, for flame-shield for kinetoscopes, granted the Vitagraph Company of America as the assignee of William Ellwood; and

No. 785237, dated March 21, 1905, for film-holder for kinetoscopes, granted the Vitagraph Company of America as the assignee of Albert E. Smith; and

3. Whereas, the Licensor is the owner of all the right, title, and interest in and to reissued letters patent of the United States numbered 12,192, dated January 12th, 1904, the original letters patent whereof are numbered 589168 and dated August 31, 1897, under which reissued letters patent licenses have been granted to the Edison Manufacturing Company of Orange, New Jersey; Pathe Freres, of New York, New York; the Kalem Company (Inc.), of New York, New York; the Essanay Film Manufacturing Company of Chicago, Illinois; the Lubin Manufacturing Company of Philadelphia, Pennsylvania; Gaston Melies, of New York, New York (for himself and as attorney in fact for George Melies of Paris, France); the Selig Polyscope Company of said Chicago; the Vitagraph Company of America, of New York, New York; George Kleine of said Chicago, and the Biograph Company, of New York, New York (which licensees are, with their successors as such, hereinafter referred to as "Patents Company Licensees"); and

4. Whereas, the Licensee desires to obtain from the Licensor a license under said reissued Letters Patent 12192, and to lease positive motion pictures in certain territory, for use in exhibiting or projecting machines containing the inventions, or any of them, described and claimed in said Letters Patent Nos. 578185, 580749, 586953, 588916, 673329, 673992, 707934, 722382, 744251, 770937, 771280, 785205, and 785237, and to sell positive motion pictures in certain other territory;

5. Now, therefore, the parties hereto, for and in consideration of the sum of one dollar to each paid by the other, and for other good and valuable considerations from each to the other moving, receipt of all of which is hereby acknowledged, have agreed as follows:

6. The Licensor hereby grants to the Licensee, for the term and subject to the covenants, conditions, and stipulations hereinafter expressed, the right and license for the United States, its territories, dependencies, and possessions (hereinafter called the "territory aforesaid") to have positive motion pictures manufactured for it by "Patents Company Licensees," and which motion pictures it shall own, on film of a greater width than approximately one inch, embodying the inventions of said reissued Letters Patent No. 12192, from negative motion pictures made in foreign countries and which are procured by it from others than "Patents Company Licensees," and to purchase positive motion pictures manufactured in foreign countries, and to lease said positive motion pictures, so manufactured for and purchased by it, in the United States, its territories, dependencies, and possessions (with the exceptions of its insular possessions and Alaska), hereinafter referred to as the "lease territory aforesaid," to motion picture exhibitors upon condition that they be used solely in exhibiting or projecting machines containing the inventions or some of them of said Letters Patent Nos. 578185, 580749, 586953, 588916, 673329, 673992, 707934, 722382, 744251, 770937, 771280, 785205, and 785237, and licensed by the Licensor and to sell said positive motion pictures so manufactured for and

purchased by it, in or for said insular possessions and Alaska and foreign countries, hereinafter referred to as "said export territory" or "for export"; it being understood and agreed by the Licensor and Licensee that the latter in the leasing of a positive motion picture shall not be limited to a single lease thereof to one motion picture exhibitor, but that it may, subject to the provisions of section 5 of paragraph hereof numbered 14, lease the same as often and to as many different motion picture exhibitors as it may desire.

The License hereby granted is personal to the Licensee and, in the event of the permanent discontinuance or retirement from business of the Licensee for a period of six consecutive months, the license hereby granted shall be immediately terminated.

7. The Licensee hereby recognizes and admits the validity of said reissued Letters Patent No. 12192 and Letters Patent Nos. 578185, 580749, 586953, 588916, 673329, 673992, 707934, 722382, 744251, 770937, 771280, 785205, and 785237 and agrees not to contest or question the same during the continuance of this agreement.

8. The Licensee covenants and agrees that all positive motion pictures manufactured for it, in the "territory aforesaid," during the continuance of this agreement, will be so manufactured for it only by "Patents Company Licensees"; that in the manufacture of such positive motion pictures in the "territory aforesaid," it will have used only negative motion pictures made in foreign countries and procured by it from others than "Patents Company Licensees"; and that it will not, in the "territory aforesaid," purchase or otherwise acquire or lease or sell or otherwise dispose of or deal in positive motion pictures except those manufactured for and purchased by it as aforesaid, without the consent in writing of the Licensor, nor sell or otherwise dispose of any negative motion pictures.

9. The Licensee covenants and agrees that it will, after the License hereby granted takes effect, pay royalty to the Licensor between the first and fifteenth days of each month on all negative motion pictures procured and positive

motion pictures purchased by it as aforesaid during the preceding month, at the maximum rate of one-half ($\frac{1}{2}$) cent per running foot hereinafter provided for; that it will keep accurate books of account and submit statements at the time of making such payments (sworn to, if required by the Licensor) giving the total number of running feet of such motion pictures, classified according to subjects, which the Licensee has so procured and purchased during the preceding month; that the Licensor shall have the right to inspect its books of account, through any reputable chartered accountants, to determine the amount of such motion pictures which it shall have so procured and purchased after the Licensee hereby granted takes effect; and that any failure to pay the said royalties when due and payable, or any making of a false return by the Licensee of the amount of such motion pictures so procured and purchased by it, shall make the license hereby granted terminable by the Licensor.

10. The Licensor further covenants and agrees that the royalties which it will charge to the Licensee for negative motion pictures procured and positive motion pictures purchased by the Licensee as aforesaid shall not, during the year preceding June 20, 1910, and during any year thereafter during the continuance of this agreement, as hereinafter provided, exceed the following rates—that is to say:

If the amount of such motion pictures for any such year be four million running feet or less, a royalty of one-half ($\frac{1}{2}$) cent per running foot on the total number of running feet for that year; if the amount thereof for any such year exceed four million running feet but do not exceed six million running feet, a royalty of four and one-half ($4\frac{1}{2}$) mills per running foot on the total number of running feet for that year; if the amount thereof for any such year exceed six million running feet but do not exceed eight million running feet, a royalty of four (4) mills per running foot on the total number of running feet for that year; if the amount thereof for any such year exceed eight million running feet but do not exceed ten million running feet, a royalty of three and three-quarters ($3\frac{3}{4}$) mills per running foot on the total num-

ber of running feet for that year; and if the amount thereof for any such year exceed ten million running feet, a royalty of three and one-quarter ($3\frac{1}{4}$) mills per running foot on the total number of running feet for that year.

The Licensor further covenants and agrees that it will, within thirty (30) days after June 20 of each year, repay to the Licensee any excess of royalties which may have been paid by the Licensee during the year by reason of the difference between the rate of one-half ($\frac{1}{2}$) cent per running foot which the Licensee shall have paid and the rate, based on the total amount of such motion pictures procured and purchased by it for the year, which the Licensee should have paid according to the foregoing schedule, the royalty rate to be charged for the period between the date hereof and June 20, 1910, to be that which would have been charged if the procuring and purchasing of such motion pictures by the Licensee had been continued for a year at the same rate at which they were so procured and purchased for such period.

The Licensor and Licensee further mutually covenant and agree that no royalty other than or in addition to that provided for in this paragraph shall be charged to or collected from the Licensee by the Licensor up to June 20, 1911, or during any renewal of this agreement up to August 31, 1914, the date of the expiration of said reissued Letters Patent No. 12192, and no royalty whatever shall be charged to or collected from the Licensee by the Licensor after either of the claims of said reissued Letters Patent No. 12192 and either of the claims of reissued Letters Patent No. 12097, dated September 30, 1902 (owned by the Licensor and under which all of the Patents Company Licensees, with the exception of George Kleine, have been licensed), in any suit for infringement thereof, is held invalid by a court that last hears and decides such suit, or after August 31, 1914, during any renewal of this agreement.

11. The Licensee further covenants and agrees not to sell or otherwise dispose of or offer for sale, in the "territory aforesaid," unexposed positive or negative motion picture films during the continuance of this agreement; but this

provision shall not prevent the Licensee from selling, as refuse, in the "territory aforesaid," second-hand positive or negative motion pictures which have been used or become shopworn or in any way damaged, to a manufacturer or manufacturers licensed by the Licensor to manufacture sensitized motion picture film for "Patents Company Licensees," or to a manufacturer to manufacture other articles than film therefrom, but only after they have been rendered by the Licensee unsuitable for use as motion pictures by cutting or otherwise defacing them; nor from selling exposed positive or negative film (either waste or in rolls) known as "blank film" for use by exhibitors for leaders or for spacing or for similar purposes, but which shall not and can not be otherwise employed for the exhibition of motion pictures.

12. The Licensee further covenants and agrees not to lease, loan, rent out, sell, or offer for sale, or otherwise dispose of in the "territory aforesaid," motion pictures to anyone purchasing or otherwise obtaining, leasing, using, loaning, renting out, selling, offering for sale, or otherwise disposing of or dealing in motion pictures containing the invention of said reissued Letters Patent No. 12192, not the output of the Licensee or of other licensees of the Licensor under said Letters Patent.

13. It is further mutually covenanted and agreed by the Licensor and Licensee that the Licensee shall have the right to sell motion pictures, manufactured for or purchased by it as aforesaid, in or for "said export territory," when the goods, addressed to the purchaser, agent, or consignee, are delivered to the vessel or to a transportation company for transportation to "said export territory," and not otherwise; but in no case shall sales "for export" of motion pictures be knowingly made by the Licensee to persons, firms, or corporations whom such Licensee has reason to believe will reimport them into the "lease territory aforesaid" for sale or use.

14. It is further mutually covenanted and agreed by and between the Licensor and Licensee that no lease of positive motion pictures manufactured for or purchased by the

Licensee, as aforesaid, shall be made in the "lease territory aforesaid" by the Licensee, except upon and subject to the following terms and conditions, namely: (1) That the lessee of such positive motion picture shall not sell or otherwise dispose of the same, but shall only have the right to use such positive motion picture in giving motion-picture exhibitions in machines licensed by the Licensor under the said Letters Patent Nos. 5751185, 550749, 5560933, 538916, 573329, 673992, 707934, 722382, 744251, 770937, 771280, 785205, and 785237, or one or more of them, or under any other letters patent that it may hereafter acquire or control; and (2) that the lessee shall not make or permit others to make any reproduction commonly known as a "dupe" of such positive motion picture or any other positive motion picture containing the invention of said reissued Letters Patent No. 12192; and (3) that the lessee shall not sublet such motion picture; and (4) that the lessee of such positive motion picture shall not remove the trademark or trade name or title therefrom; and (5) that the Licensee shall on the first day of every month, beginning with December 1, 1916, withdraw from the market an amount of such positive motion pictures (not leased by the Licensee over twelve months before) equal to the amount of such positive motion pictures that was so leased by it during the seventh month preceding the date of each such withdrawal, with the exception, however, that where any such positive motion pictures are destroyed by fire or lost in transportation the amount so destroyed or lost shall be deducted from the amount to be withdrawn as aforesaid; and (6) that the violation of any of the foregoing conditions entitles the licensor to immediate possession of such motion picture without liability for any price which the lessee or the person in whose possession it is found may have paid therefor.

15. The Licensee covenants and agrees that in the "lease territory aforesaid" the Licensee will dispose of the positive motion pictures manufactured for and purchased by it, as aforesaid, only by the sale "for export" and shipment thereof into "said export territory" or by the lease thereof to motion-picture exhibitors for the purpose only of using such

motion pictures for giving exhibitions thereof in exhibiting or projecting machines licensed by the Licensor containing the inventions, or some of them, described and claimed in said Letters Patent Nos. 578185, 589749, 589953, 588916, 673323, 673992, 707934, 723282, 742491, 770937, 771280, 785205, and 785297, or in Letters Patent hereafter acquired or controlled by the Licensor; and will not use the same for the purpose of giving exhibitions thereof for profit, directly or indirectly; it being expressly understood and agreed by and between the Licensor and Licensee, however, that the Licensee shall be at liberty to give exhibitions of such positive motion pictures without profit, directly or indirectly, and to possible or prospective lessees or purchasers thereof; and the Licensee further covenants and agrees not to knowingly allow positive motion pictures manufactured for or purchased by it under this agreement to be used with any exhibiting or projecting machine not licensed by the Licensor under the Letters Patent mentioned in this paragraph, and that it may hereafter acquire or control; or one or more of them, except by and with the consent of the Licensor; and also to refrain from supplying such motion pictures manufactured for or purchased by it under this agreement, for use with any exhibiting or projecting machine, the license for which, under the aforesaid Letters Patent, or one or more of them, has been terminated; and the Licensee has been notified thereof by the Licensor; and also to refrain from supplying such motion pictures manufactured for and purchased by it under this agreement to any lessee who may loan or sublease such motion pictures and the Licensee has been notified thereof by the Licensor, or who may use such motion pictures for giving exhibitions thereof in exhibiting or projecting machines not licensed by the Licensor as aforesaid, or the license for which has been terminated and the Licensee has been notified thereof by the Licensor; and the Licensor covenants and agrees to promptly notify the Licensee and all other persons, firms, and corporations licensed under said reissued Letters Patent No. 12192 of the termination of any license for the use of any exhibiting

or projecting machines under the aforesaid Letters Patent, or any of them.

16. The Licensor and Licensee further mutually covenant and agree that if in any suit brought upon said reissued Letters Patent No. 12192 either of the claims of said reissued Letters Patent No. 12192 is held invalid by a court that last hears and decides such suit, or should be held by such court not to be infringed, then, and in any such case, the Licensee may at once terminate this agreement and the license thereby granted, by giving notice of its election so to do to the Licensor.

17. The Licensor and Licensee further mutually covenant and agree that by the expression "motion pictures" as used in the foregoing agreement is meant transparent or translucent tapelike film having photographs thereon of objects in motion.

18. It is further mutually covenanted and agreed by and between the Licensor and Licensee that, unless sooner terminated, as hereinbefore or hereinafter provided, this agreement and the license granted thereby shall take effect at the date hereof, and shall continue until June 26, 1911, but that the Licensee may renew this agreement and license thereafter from year to year upon the same terms, conditions, and stipulations as herein provided by giving notice to the Licensor on or before April 20 of each year, beginning with the year 1911, of the Licensee's election to so renew this agreement and license, and upon the giving of each such notice this agreement and the license thereby granted shall be considered and treated by the Licensor and Licensee as renewed for a period of one year, beginning June 26th of the year following such notice, except that the last renewal period shall be for the period from June 20, 1914, to August 26, 1919, the date of expiration of the Letters Patent No. 707184.

It is further mutually covenanted and agreed by and between the Licensor and Licensee that if, during said original term or during any such renewal period, either party should knowingly or through gross neglect or care-

lessness be guilty of a breach, violation, or nonperformance of its covenants, conditions, and stipulations, resulting in substantial injury to the other party, and should for the period of forty (40) days after notice thereof from the other party persist therein or fail to correct, repair, or remedy the same, then and in such case the party aggrieved may terminate this agreement by giving notice in writing to the guilty party of its intention so to do. It is, however, mutually covenanted and agreed by and between the Licensor and Licensee that if the guilty party should correct, repair, or remedy such breach, violation, or nonperformance of its covenants, conditions, and stipulations within the said period of forty (40) days after such notice, and should thereafter knowingly or through gross neglect or carelessness be guilty of a second breach, violation, or nonperformance of its covenants, conditions, and stipulations, resulting in substantial injury to the other party, then and in such case the party aggrieved may terminate this agreement by giving thirty (30) days' notice in writing to the guilty party of its intention so to do. Such termination of the agreement, however, shall not prejudice either party hereto in the recovery of damages because of any such breach, violation, or nonperformance by the other party hereto.

19. All notices provided for in this agreement shall be in writing and shall be given by delivering the same to the Licensor or Licensee, as the case may be, or to an officer of the Licensor or Licensee, as the case may be, or by depositing such notice, postage prepaid, in any post office of the United States, in a sealed envelope directed to the Licensor or the Licensee, as the case may be, at its last known post-office address, to be forwarded by registered mail.

20. It is mutually covenanted and agreed by and between the Licensor and Licensee that after notice of the termination of this agreement and the license granted thereby by either party, as provided for in paragraphs 16 and 18 of this agreement, and after the same have been terminated, no matter what the cause or manner of termination may be, neither

this license agreement, nor the fact that the Licensee has entered into or acted under it, shall be used in any manner, directly or indirectly, by or for the Licensor, its successors, assigns or legal representatives, or by or for others with its or their consent or permission, against Licensee, or the Licensee's successors or legal representatives, in any litigation, controversy or proceeding involving the Licensee or them or any other persons, firms or corporations, or in any other way, it being understood and agreed that upon such termination the positions and rights of the Licensor and Licensee shall be the same as if this agreement had not been made; provided, however, that the rights of neither party shall be prejudiced by such termination in the recovery of damages for any breach or other violation of this agreement by the other occurring prior to such termination.

In witness whereof, the parties hereto have caused this agreement to be executed by their officers duly authorized to perform these acts, the day and year first above written.

MOTION PICTURE PATENTS COMPANY,
By FRANK L. DYER, *President*.
GENERAL FILM COMPANY,
By J. J. KENNEDY, *President*.

Attest:
GEORGE F. SOULL,
Secretary.

EXHIBIT 8.

**Agreement Between General Film Company
and Edison Manufacturing Company,
April 21, 1910.**

1. Articles of agreement, made and entered into this ____ day of _____, 1910, by and between the Edison Manufacturing Company, a corporation organized and existing under the laws of the State of New Jersey, and having an office in the city of Orange in said State, party of the first part, and the General Film Company, a corporation organized and existing under the laws of the State of Maine, and having an office in the city, county, and State of New York, party of the second part, witnesseth that:

2. Whereas the party of the first part has been licensed by the Motion Picture Patents Company, of New York City, to manufacture motion pictures by the use of cameras under reissued Letters Patent No. 12037, dated September 30, 1902, Letters Patent No. 629068, dated July 18, 1899, and Letters Patent No. 707334, dated August 20, 1902, and containing the inventions of reissued Letters Patent No. 12192, dated January 12, 1904, _____, and to lease positive motion pictures so manufactured _____ by it (hereinafter referred to as "Licensed Motion Pictures") for use on projecting machines licensed by said Motion Picture Patents Company (hereinafter referred to as "Licensed Projecting Machines") under Letters Patent Nos. 678185, 680749, 680933, 688916, 637329, 673992, 707034, 722382, 744251, 770937, 771280, 785205, and 785237, owned by said Motion Picture Patents Company, covering motion picture projecting machines; and

3. Whereas, the party of the second part has been licensed by said Motion Picture Patents Company to lease such "Licensed Motion Pictures," but only on film of a greater width than approximately one (1) inch, from persons, firms and corporations licensed by said Motion Picture Patents Company to manufacture or manufacture and import such

"Licensed Motion Pictures," and to sublet the said "Licensed Motion Pictures" in certain territory (which, however, may hereafter be extended), to motion picture exhibitors for use on "Licensed Projecting Machines"; and has also been licensed by said Motion Picture Patents Company to have positive motion pictures (hereinafter included in the term "Licensed Motion Pictures") manufactured for it by certain of said licensees, including the party of the first part (and hereinafter referred to as the "Patents Company Licensees aforesaid") on film of the width aforesaid, embodying the inventions of said reissued Letters Patent No. 12192 from negative motion pictures made in foreign countries and which are procured by it from others than the "Patents Company Licensees aforesaid," and which positive motion pictures it shall own, and also to purchase positive motion pictures (hereinafter included in the term "Licensed Motion Pictures") manufactured in foreign countries, and to lease all said positive motion pictures to motion picture exhibitors for use by such exhibitors on "Licensed Projecting Machines"; and

4. Whereas, the party of the second part is desirous of leasing "Licensed Motion Pictures," on film of the width aforesaid, from the party of the first part for the purpose of subleasing the same to motion picture exhibitors, under its license aforesaid from the Motion Picture Patents Company;

5. Now, therefore, the parties hereto of the first and second parts do hereby covenant and agree as follows:

6. The party of the first part covenants and agrees that it will, during the continuance of this agreement, supply the party of the second part with as many copies of each "Licensed Motion Picture," released by the party of the first part, on film of the width aforesaid, as the party of the second part requires for the conduct of its business, and will so supply them at the same leasing prices and otherwise upon the same terms and conditions as it, at corresponding times, leases such "Licensed Motion Pictures" to other persons, firms, or corporations, and that it will not, during the continuance of this agreement, discriminate against the party of the second part, in favor of other per-

sons, firms, or corporations to whom it leases such "Licensed Motion Pictures," in filling orders for such "Licensed Motion Pictures," in terms of payment therefor or in any other way which might give, or tend to give, such other persons, firms, or corporations any advantage over the party of the second part.

7. The party of the second part covenants and agrees that it will, during the continuance of this agreement, lease from the party of the first part "Licensed Motion Pictures," on film of the width aforesaid, at the prices and upon the terms and conditions provided for in the last preceding paragraph, and that it will, on each Monday, make or mail payment to the party of the first part for all such "Licensed Motion Pictures," shipped by the party of the first part to the party of the second part, on the order of the latter, and for which the party of the second part has received invoices from the party of the first part, during the preceding week; and that it will use its best efforts to introduce the same to and extend the use thereof by motion-picture exhibitors using the "Licensed Projecting Machines," aforesaid; that for each sixty-two customers or the major fraction thereof that it serves during any two consecutive weeks during the continuance of this agreement from any place of business operated by it for the purpose of leasing and subleasing motion pictures among motion-picture exhibitors, it will lease from the party of the first part, during each such two consecutive weeks, and will distribute from each such place of business, one reel, of a subject or subjects released by the party of the first part not more than one month previously, of approximately one thousand (1,000) running feet of such "Licensed Motion Pictures," and that it will so lease such a reel for each such place of business during any such two consecutive weeks, even if its customers, which it serves from such place of business during such two consecutive weeks, do not aggregate sixty-two customers or the major fraction thereof; it being expressly covenanted and agreed, however, by and between the parties hereto that the party of the second part shall not be required to lease from the party of the first part more than eighty (80)

reels of approximately one thousand (1,000) running feet per reel of "Licensed Motion Pictures" in any two consecutive weeks; and further that it may lease "Licensed Motion Pictures" on film of the width aforesaid from other "Patents Company Licensees aforesaid" than the party of the first part, and submit such "Licensed Motion Pictures" to motion-picture exhibitors.

8. The party of the second part further covenants and agrees that it will, in addition to the leasing prices hereinbefore referred to, pay to the party of the first part, at the end of each year during the continuance of this agreement, the following share of the net profit realized by it during that year from the subleasing and leasing, as aforesaid, of "Licensed Motion Pictures," to exhibitors and from the sale of "Licensed Projecting Machines," and from all other sources, to wit: Such a proportion of the balance, if any, of such net profit, remaining after deducting therefrom the dividend of seven per cent (7%) for that year on its issued preferred stock and an amount equal to a twelve per cent (12%) dividend on its issued common stock, as the number of running feet of "Licensed Motion Pictures" leased by it from the party of the first part during that year bears to the total amount of running feet of "Licensed Motion Pictures" leased by it from all "Patents Company Licensees aforesaid" during that year ("Licensed Motion Pictures" manufactured for or purchased by the party of the second part, as aforesaid, as well as "Licensed Motion Pictures" leased to it by "Patents Company Licensees aforesaid" produced from negatives made on its order, to be excluded).

9. It is mutually covenanted and agreed by and between the parties hereto that by "net profit," as used in the last preceding paragraph, is meant moneys remaining after deducting from the gross earnings and income of the party of the second part from "Licensed Motion Pictures" and "Licensed Projecting Machines" and from all other sources, all operating expenses connected with the business of the party of the second part.

10. It is mutually covenanted and agreed by and between the parties hereto that the yearly payments out of the bal-

ance of net profit provided for in paragraph hereof numbered 8 may, at the option of the party of the second part, be made wholly or partly by promissory notes of the party of the second part bearing interest at the rate of six (6) per cent per annum and each payable at a date not later than three years from the date on which the payment for which it is issued is due; provided, however, (e) that if, in any year it should make payments in this manner to the party of the first part, it shall for that year make payments in like manner to all of the "Patents Company Licensees aforesaid" from whom it may have leased "Licensed Motion Pictures" during that year and who may be entitled to share in the balance of net profit of that year provided for in paragraph hereof numbered 8; (b) that if in any year it should make such payments partly in cash and partly in promissory notes the cash shall be apportioned among the several "Patents Company Licensees aforesaid" according to the number of running feet of "Licensed Motion Pictures" leased by each during that year to the party of the second part, relatively to the total amount of running feet leased by all to the party of the second part during that year, and the notes shall be apportioned in like manner; and (c) that all notes issued by it in each year to the several "Patents Company Licensees aforesaid" in full or partial payment as aforesaid shall be alike as to form, date, rate of interest, duration and place of payment; shall be paid by it without preference to one payee over another; shall be fully paid by it before any cash payments are made by it in subsequent years to "Patents Company Licensees aforesaid" on account of their share as aforesaid of the balance of net profit for such years; shall be paid before any payment is made on the notes issued in such subsequent years to "Patents Company Licensees aforesaid" on account of such share of the balance of net profit; and shall share pro rata, according to their respective face values, in any money to be used by it for making partial payments on such notes.

11. It is further mutually covenanted and agreed by and between the parties hereto that, unless previously terminated as hereinafter provided, this agreement shall continue until

August 26, 1919, the date of expiration of the letters patent aforesaid No. 707034.

12. It is further mutually covenanted and agreed that if the license to the party of the first part referred to in paragraph hereof numbered 2 be terminated prior to August 26, 1919, the date of expiration of said letters patent No. 707034, or if the license aforesaid to the party of the second part to lease "Licensed Motion Pictures" from the party of the first part and other "Patents Company Licensees aforesaid" be terminated prior to August 26, 1919, the date of the expiration of said letters patent No. 707034, then and in either of such cases this agreement shall at once terminate.

13. It is further mutually covenanted and agreed by and between the parties hereto that if either party should knowingly or through gross neglect or carelessness be guilty of a breach, violation, or nonperformance of its covenants, conditions, and stipulations resulting in substantial injury to the other party, and should, for the period of forty (40) days after notice thereof from the other party, persist therein or fail to correct, repair, or remedy the same, then and in such case the party aggrieved may terminate this agreement by giving notice in writing to the guilty party of its intention so to do; it being, however, mutually covenanted and agreed by and between the parties hereto that if the guilty party should correct, repair, or remedy such breach, violation, or nonperformance of its covenants, conditions, and stipulations within the said period of forty (40) days after such notice, and should thereafter knowingly, or through gross neglect or carelessness be guilty of a second breach, violation, or nonperformance of its covenants, conditions, and stipulations, resulting in substantial injury to the other party, then and in such case the party aggrieved may terminate this agreement by giving thirty (30) days' notice in writing to the guilty party of its intention so to do. Such termination of the agreement, however, shall not prejudice either party hereto in the recovery of damages because of any such breach, violation, or nonperformance by the other party hereto.

14. It is further mutually covenanted and agreed that in case of the termination of this agreement as provided

for in paragraphs hereof numbered 12 and 13, or in case the party of the first part should become bankrupt, then at the end of the year in which either of these events occurs the party of the first part shall be entitled to such a proportion of the balance of net profit for that year, as heretofore defined, as the number of running feet of "Licensed Motion Pictures" leased by the party of the second part from it during that year bears to the total amount of running feet of "Licensed Motion Pictures" leased by the party of the second part from all "Patents Company Licensees aforesaid" during that year ("Licensed Motion Pictures" manufactured for or purchased by the party of the second part, as aforesaid, as well as motion pictures leased to it by "Patents Company Licensees aforesaid" produced from negatives made on its order, to be excluded).

15. All notices provided for in this agreement shall be in writing, and shall be given by delivering the same to the party of the first part or the party of the second part, as the case may be, or to an officer of the party of the first part or the party of the second part, as the case may be, or by depositing such notice, postage prepaid, in any post office of the United States, in a sealed envelope directed to the party of the first part or the party of the second part, as the case may be, at its last known post-office address, to be forwarded by registered mail.

16. It is further mutually covenanted and agreed by and between the parties hereto that any rights hereby granted by one party to the other are personal and to nonassignable by the latter without the consent in writing of the former.

In witness whereof, the parties hereto have caused this agreement to be executed by their officers duly authorized to perform these acts, the day and year first above written.

EDISON MANUFACTURING COMPANY,
By FRANK L. DYER, Vice President.

In the presence of—
J. J. KENNEDY,
Wm. P. HAZEN.

EXHIBIT 8.

Reissued Letters Patent 12192.

No. 12192.

Reissued January 12, 1904.

UNITED STATES PATENT OFFICE.

THOMAS A. EDISON, OF LLEWELLYN PARK, NEW
JERSEY.

KINETOSCOPIC FILM.

Specification forming part of Reissued Letters Patent No. 12192, dated January 12, 1904.

Original No. 88528, dated August 21, 1895. Release No. 12508, dated September 30, 1900. Application for present release filed December 17, 1900. Serial No. 103567.

To all whom it may concern:

Be it known that I, Thomas A. Edison, a citizen of the United States, residing at Llewellyn Park, in the county of Essex and State of New Jersey, have invented a certain new and useful Improvement in Kinetoscopic Films (Case No. 928), of which the following is a specification.

The purpose I have in view is to produce pictures representing objects in motion throughout an extended period of time which may be utilized to exhibit the scene including such moving objects in a perfect and natural manner by means of a suitable exhibiting apparatus, such as that described in an application filed simultaneously herewith (Patent No. 493426, dated March 14, 1893). I have found that it is possible to accomplish this end by means of photography.

In carrying out my invention I employ an apparatus for effecting by photography a representation suitable for reproduction of a scene including a moving object or objects comprising a means, such as a single camera, for intermittently projecting at such rapid rate as to result in persistence of vision images of successive positions of the object or objects in motion as observed from a fixed and single point of view, a sensitized tape-like film, and a means for so moving

the film as to cause the successive images to be received thereon separately and in single-line sequence. The movements of the tape-film are intermittent, and it is preferable that the periods of rest of the film should be longer than the periods of movement.

By taking the photographs at a rate sufficiently high as to result in persistence of vision the developed photographs will, when brought successively into view by an exhibiting apparatus, reproduce the movements faithfully and naturally.

I have been able to take with a single camera and a tape-film as many as forty-six photographs per second, each having a size measured lengthwise of the tape of one inch, and I have also been able to hold the tape at rest for nine-tenths of the time; but I do not wish to limit the scope of my invention to this high rate of speed nor to this great disproportion between the periods of rest and the periods of motion, since with some subjects a speed as low as thirty pictures per second or even lower is sufficient, and while it is desirable to make the periods of rest as much longer than the periods of motion as possible any excess of the periods of rest over the periods of motion is advantageous.

In the accompanying drawings, forming a part hereof, Figure 1 is a plan view, with the top of the casing removed, of a form of apparatus which I have found highly useful for the taking of the photographs. Fig. 2 is a vertical longitudinal section on line *x-x* in Fig. 1. Figs. 3 and 4 are enlarged views of the stop mechanism of the photographing apparatus. Fig. 5 is a plan view of the shutter for the photographing apparatus, and Fig. 6 is a perspective view of a section of the tape-film with the photographs thereon.

Referring to the drawings, 3 indicates the transparent or translucent tape-film, which before the apparatus is put in operation is all coiled on a reel in the sheet-metal box or case 1, the free end being connected to an empty reel in the case 2. The film 3 is preferably of sufficient width to admit the taking of pictures one inch in diameter between the rows of holes 4, Figs. 2 and 6, arranged at regular intervals along the two edges of the film, and into which holes the teeth of

the wheels 5, Figs. 1 and 2, enter for the purpose of positively advancing the film. When the film is narrow, it is not essential to use two rows of perforations and two feed-wheels, one feed-wheel being sufficient. Said wheels are mounted on a shaft 6, which carries a loose pulley 7—that is, a pulley frictionally connected to its shaft and forming a yielding mechanical connection. This pulley is driven by a cord or belt 8 from a pulley 9 on the shaft 10, which shaft is driven by means of the beveled gears 11 12. The wheel 13 is preferably driven by an electric motor 13, which when the apparatus is in use is regulated to run at the desired uniform speed, being controlled by the centrifugal governor 14 and the circuit-controller 15 in a well-known manner. On the shaft 10 is another pulley 16, which is connected by a cross-belt 17 to a pulley 18, also frictionally connected to its shaft, and which carries the reel to which the tape is connected in casing 2. The film passes from the casing 1 through a slit formed by the edge 19 and the sliding door 20, which is normally thrown forward by the spring 21, Fig. 2, with sufficient force to clamp the film and hold it from movement. When the door 20 is retracted by pulling on the rod or string 22, which is connected to the arm 22', the film is liberated and allowed to advance. Film-case 2 is provided with a similar door, but the device for moving the door is not illustrated. This arrangement of the sliding door not only holds the film, but it tightly closes the casing, thus excluding light and protecting the sensitive film. The casings or boxes 1 2 are removable, so that they, with the inclosed film, may be taken bodily from the apparatus. The shaft 6, heretofore referred to, is provided with a detent or stop-wheel 23, the form of which is most clearly shown in Figs. 3 and 4. The wheel 23 is provided with a number of projecting teeth 24, six being shown, which teeth are adapted to strike successively against the face of the cooperating detent or stop-wheel 25 on the shaft 26, which is the armature-shaft of the motor or a shaft which is constantly driven by the motor. The wheel 25 has a corresponding number of notches 27 at regular intervals around its periphery. These notches are

of such size and shape that the tooth 24 can pass through them, and when the wheels 23 and 25 are rotated in the direction indicated by the arrows each tooth in succession will strike the face of wheel 25, thereby bringing the film absolutely to rest at the same moment that an opening in the shutter exposes the film, and will then pass through a notch, allowing the tape-film to be moved forward another step while it is covered by the shutter. To avoid the danger of the wheel 25 moving so quickly that a tooth cannot enter the proper notch, a laterally-projecting tooth 29 is provided adjacent to each notch. When a tooth 25 strikes a tooth 24, the latter tooth will be guided by the tooth 29 into the adjacent notch 27.

30 is a detent spring or pawl to prevent backward movement of the wheel 23.

I prefer to so proportion the parts above described that the wheel 23 is at rest for nine-tenths of the time in order to give to the sensitized film as long an exposure as practicable and is moving forward one-tenth of the time, and said forward movement is made to take place thirty or more times per second, preferably at least as high as forty-five times per second, although the rapidity of movement or number of times per second may be regulated as desired to give satisfactory results. The longer interval of rest of the film insures a good impression of the object projected thereon and results in a picture having clean and sharp lines, since the film has sufficient time to become steady and overcome the vibration caused by the sudden and rapid motions of the feed mechanism. On the shaft 26 or on any suitable shaft driven by the motor is a revolving disk 31, serving as a shutter for alternately exposing and covering the sensitive film. This disk, which is continuously revolving, is provided with six or any other suitable number of apertures 32 at regular intervals around it near the edge, they being so arranged that one of the apertures passes directly between the camera-lens 33 and the film each time the film is brought to rest, the light-rays passing through the opening 33' and falling on the film halfway between the rests on which the film is wound.

34 is a device for adjusting the camera-lens toward or from the film, and 35 is a device by means of which the operator can focus the camera on the object to be photographed.

Although the operation has been partially indicated in the description of the apparatus, it will now be set forth more in detail.

The apparatus is first charged with a sensitive tape-film several hundred or even thousands of feet long and the motor is set in operation. Since the spring 21 causes the door 20 to clamp the film, as already described, the loose pulleys 7 18 slip without pulling said film along; but when a moving object—for example, a man gesticulating—is placed in the field of the camera and the handle 22 is pulled the film is released and the pulleys operate to pull the same along. At the same time the reel in case 2 is rotated to wind up the film, thus transferring it from the reel in case 1 to the reel in case 2. This movement is intermittent, the film advancing by very rapid steps, which are definitely and positively controlled by means of the peculiar detent or escapement described, and a photograph is taken after each step.

While I do not care to limit myself to any particular number of steps per second, there should be at least enough so that the eye of an observer cannot distinguish, or at least cannot clearly and positively distinguish, at a glance a difference in the position occupied by the object in the successive pictures, as illustrated in Fig. 7. A less speed in taking the pictures will cause a trembling or jerky appearance in the reproduced picture. When the movement of the object being photographed has ceased or the desired number of photographs has been obtained, the apparatus is stopped. The film is suitably treated for developing and fixing the pictures, when it is ready for use in an exhibiting apparatus. It will be observed that all the photographs on the film are taken through the same camera-lens, which results in such a uniformity of photographs as would be unattainable were the photographs taken through different lenses.

What I claim is—

1. An unbroken transparent or translucent tape-like photographic film having thereon uniform sharply-defined equidistant photographs of successive positions of an object in motion as observed from a single point of view at rapidly-recurring intervals of time, such photographs being arranged in a continuous straight-line sequence, unlimited in number save by the length of the film, and sufficient in number to represent the movements of the object throughout an extended period of time, substantially as described.

2. An unbroken transparent or translucent tape-like photographic film provided with perforated edges and having thereon uniform sharply-defined equidistant photographs of successive positions of an object in motion as observed from a single point of view at rapidly-recurring intervals of time, such photographs being arranged in a continuous straight-line sequence, unlimited in number save by the length of the film, and sufficient in number to represent the movements of the object throughout an extended period of time, substantially as described.

This specification signed and witnessed this 15th day of December, 1903.

THOMAS A. EDISON.

Witnesses:

FRANK L. DYER,
HARRY G. WALTERS.

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA,

Petitioner,

v.

MOTION PICTURE PATENTS CO. and others,
Defendants.No. 888.
Sept. Term, 1912.

NEW YORK CITY, October 21st, 1913.

Upon application of counsel for petitioner, counsel for defendants consenting thereto, the hearings were postponed until 10:30 o'clock A. M., November 10th, 1913, to be resumed at Manhattan Hotel.

NEW YORK CITY, November 10th, 1913.

The hearings were resumed pursuant to adjournment at 10:30 o'clock A. M., November 10th, 1913, at Manhattan Hotel, New York City.

Present on behalf of the Petitioner, Hon. EDWIN P. GROSVENOR, Special Assistant to the Attorney General.

J. R. DARLINGTON, Esq., Special Agent.

Present also, Messrs. CHARLES F. KINGSLEY GEORGE B. WILLES and FRED B. WILLIAMS, appearing for Motion Picture Patents Company, Biograph Company, Jeremiah J. Kennedy, Harry N. Marvin and Armat Moving Picture Company.

Mr. J. H. CALDWELL, appearing for William Pelsor, General Film Company, Thomas A. Edison, Inc., Kalem Company, Inc., Melies Manufacturing Company, Pathe Freres, Frank L. Dyer, Samuel Long, J. A. Berst and Gaston Melies.

1 Mr. HENRY MEVILLE, attorney for George Klein,
 Esanay Film Manufacturing Company, Selig
 Polyscope, George K. Spoor and W. N. Selig.
 Mr. JAMES J. ALLEN, appearing for Vitagraph
 Company of America, and Albert E. Smith.

Mr. CALDWELL: I want to note on the record the
 withdrawal of my firm as counsel or attorneys for
 Gaston Melies and the Melies Manufacturing Com-
 pany.

2 I will call Mr. Frank L. Dyer.

Thereupon, FRANK L. DYER, the next witness called
 by defendants, of lawful age, duly sworn, deposed:

Direct examination by Mr. CALDWELL:

Q. Where do you live, Mr. Dyer, and in what business
 are you engaged? A. I live at Montclair, New Jersey, and
 am President of the General Film Company.

Q. How long have you been the President of the Gen-
 eral Film Company? A. Since December, 1912.

3 Q. And prior to December, 1912, in what business were
 you engaged? A. To July, 1908, I acted as general counsel
 for Mr. Edison, and in addition my time was almost entire-
 ly occupied as the executive head of his various corpo-
 rations. I was President of the National Phonograph Com-
 pany, a concern that manufactured and sold phonograph
 records and also sold phonographs; I was general manager
 of the Edison Phonograph Works, a concern that manu-
 factured Edison phonographs; I was Vice-President of the
 Edison Manufacturing Company, a concern that manufact-
 ured and sold moving picture films and sold Edison Kinet-
 oscopes, which were made by the Edison Phonograph
 Works, and which also manufactured and sold Edison
 primary batteries. I was President of the Edison Busi-
 ness Phonograph Company, a concern that sold Edison
 business phonographs, which were made by the Edison
 Phonograph Works. I was President of the Bates Manu-
 facturing Company, a concern that sold the Bates Num-
 bering Machine made by the Edison Phonograph Works. I
 was Vice-President of the Edison Storage Battery Com-
 pany, a concern that manufactured and sold Edison Storage

4 batteries, which were made by the Edison Phonograph
 Works, and which also manufactured and sold Edison
 primary batteries. I was President of the Edison Busi-
 ness Phonograph Company, a concern that sold Edison
 business phonographs, which were made by the Edison
 Phonograph Works. I was President of the Bates Manu-
 facturing Company, a concern that sold the Bates Num-
 bering Machine made by the Edison Phonograph Works. I
 was Vice-President of the Edison Storage Battery Com-
 pany, a concern that manufactured and sold Edison Storage

Batteries. I was Director of the Edison Portland Cement
 Company—

Mr. GROSSKOPF: Of what?

The Witness: Director of the Edison Portland Cement
 Company, a concern that manufactured and sold Edison
 Portland cement. I was a Director of several of the
 foreign corporations, whose names I do not now recall, and
 had the executive management of the various concerns
 which sold Edison products in Great Britain, France, Ger-
 many, Australia and Argentina. I was President of the
 Motion Picture Patents Company from December, 1908, to
 November, 1912, and I have been a Director of the General
 Film Company since its formation.

By Mr. CALDWELL:

Q. Now, prior to 1908, in what business were you en-
 gaged? A. I was general counsel for Mr. Edison from
 April, 1903, to July, 1908, and organized at the Edison
 Laboratory, a well equipped legal department that had
 charge of Mr. Edison's patents and legal work.

3 Q. At what time was the Edison Manufacturing Com-
 pany succeeded by the Thomas A. Edison Company, Incor-
 porated? A. I think it was March 1st, 1912, but it may
 have been March 1st, 1911, that, at my suggestion the
 name of the National Phonograph Company was changed to
 Thomas A. Edison, Incorporated, and at that time the Na-
 tional Phonograph Company acquired the property of the
 Edison Manufacturing Company, the Bates Manufacturing
 Company and the Edison Business Phonograph Company.

Q. You were President, were you not, also, of the Thomas
 A. Edison Company, Incorporated? A. Yes, I was Presi-
 dent of the Thomas A. Edison Company, Incorporated, from
 the time its name was changed until I resigned.

Q. And one of the principal businesses of that company
 was the motion picture business, was it not? A. No. The
 principal business of the Thomas A. Edison Company, In-
 corporated—

Q. (interrupting): I said one of the principal busi-
 nesses? A. The principal business of the Thomas A. Edison
 Company, Incorporated, was the handling of Edison phono-

1 grapha. That business was probably as large as the entire
moving picture business of the country, but the business of
handling moving picture films was an important part of
its business.

Q. Prior to 1903, you were engaged actively in the practice of patent law, were you not? A. I was.

Q. Have you ever made any particular study of the industrial arts in connection with your work as a patent attorney? A. Yes, I have always been interested in mechanical matters. I am a member, or rather, an associate member of the American Society of Mechanical Engineers, my membership in that society being based on my work as an inventor.

Q. What connection, if any, did you have with the business end of the motion picture business after you went with Mr. Edison, in 1903, and up to the time when you left him? A. I had the executive charge of the motion picture business, and kept pretty close track of it. Of course, my work was very general. I was quite familiar with the manufacturing operations and frequently visited the studio.

Q. You had occasion also to frequently visit and inspect the so-called manufacturing plant at which the positives were printed? A. Oh, yes; I was entirely familiar with the plant, and frequently went to it, and was consulted about changes that were made from time to time, and enlargements of the plant. We also changed the process of developing, while I was connected with Mr. Edison's companies. Primarily, the developing was carried out in drums, and later the so-called rack system was introduced.

Q. In your capacity as Vice-President of the company, and subsequently, President of the Edison Manufacturing Company, having general supervision of the business of the company, were you to some extent familiar with the operations of your competitors? A. Yes. I have visited the plants of a good many of our competitors, both the licensed manufacturers and the independent manufacturers, and, I know generally that the manufacturing operations are about the same in all the plants I have visited. I think the Edison plant represented a very good development of the art.

Mr. GROSVENOR: If I may interrupt, what do you mean by the word "plant," what does that term embrace.

The Witness: By "plant" I would include the studio, and also, in the case of the Edison Company, the part of the factory that was devoted to printing and developing operations.

By Mr. CALDWELL:

Q. State what suits were brought by Mr. Edison or the Edison Manufacturing Company on the patents owned by him pertaining to the motion picture art, at any time prior to January 1st, 1909. You may commence, if you will, with the original Letters Patent issued in 1897, was it not, covering the camera and film? A. Yes. When the original patent was granted in 1897, suit was commenced against the American Microscope & Biograph Company, now called the Biograph Company, and that suit was very vigorously prosecuted. It was brought on to final hearing before Judge Wheeler, and Judge Wheeler handed down an opinion sustaining the patent and holding it to be infringed, both as to the claims on the camera and on the film. On appeal to the Circuit Court of Appeals the Court held that the claims were too broad; and therefore, the patent was reversed in two parts, one covering the camera, and the other, the film. Suits were also brought on the original patent, as I remember, against the Vitaphone Company of America, Eberhard Schneider, and, I think, Lubin, of Philadelphia. My recollection is that an injunction was secured under the original patent against the Vitaphone Company, and, I think also, against Eberhard Schneider.

Mr. GROSVENOR: Can you give any dates pertaining to these suits, relating to the suits, as you are testifying very generally, as I understand?

Mr. CALDWELL: We will follow this up later with the specific dates.

The Witness. I am not able to give exact dates, Mr. GROSVENOR. I know that the decisions of Judge Wheeler, and of the Circuit Court of Appeals, are printed in the Federal Reporter, but I do not remember the dates.

Mr. GROSVENOR: They have already been introduced in evidence.

1 The Witness: I didn't know that.

Mr. GROSVENOR: Can't you give the dates in respect to these other matters you have testified to, for instance, these injunctions you have named in those suits?

The Witness: No, I am not able to, except that it was subsequent to the granting of the original patent and before the final granting of the reissued patent.

2 By Mr. CALDWELL:

Q. That would be then, approximately, between 1897 and 1902? A. Yes. After the first two reissued patents were granted, suits were again brought against the Biograph Company, and I think also against the Vitaphone Company, Lubin, Selig, Melies, and perhaps others.

Q. How about the Pythe Cinematograph Co., and J. A. Beyer, or was there a suit brought against them? A. I don't recall that, but I think so. The suit against the Biograph Company on the camera patent was pressed as vigorously as possible, and that suit was brought on for final hearing before Judge Day, who held that while the claims were valid, they were not infringed. On appeal to the Circuit Court of Appeals, the Court held that certain claims of the camera release patent were infringed by the so-called Warwick camera, used by the Biograph Company, and, I think, an injunction granted. Suit on the film release was started, and it developed that the defense of the Biograph Company would be that the release instead of having narrowed the claim or claims on the film, as was the intention, actually broadened the claims. This contention was based on the fact that the word "equilibrant," which appeared in the original film patent claim, did not appear in the first reissue patent on the film. This was a clerical error, which was corrected by reissuing the film patent a second time; but it necessitated the dropping of the suits that had been brought on the first film release. My recollection is that these suits, however, were renewed against the Biograph Company and the other infringers on the second reissued film patent. What date did you want me to go up to?

Mr. GROSVENOR: Reissued film patent or camera patent?

The Witness: Film patent.

By Mr. CALDWELL:

Q. You refer now to No. 12,192, the second reissued film patent? A. Yes. What date did you want me to go up to?

Q. Up to the formation of the Motion Picture Patents Company? A. With this date in mind, I am certain that suit was brought on the second film release patent No. 12,192, against the Biograph Company, because that suit was being pressed in December, 1908.

Mr. GROSVENOR: When was that suit brought?

The Witness: I don't remember, I don't recall that—I know we were taking testimony then.

By Mr. CALDWELL:

Q. Was it brought shortly after the second reissue? A. I think so; and a suit was also brought on this second camera patent in the Summer of 1908, against infringing theatres, principally in Chicago, but nothing became of this suit.

Mr. GROSVENOR: Those being brought in 1908?

The Witness: Yes, in the Summer of 1908, and nothing became of this suit, because, about that time it seemed reasonably certain that the differences between the two contending interests would be composed, as subsequently was the case, resulting in the formation of the Motion Picture Patents Company.

By Mr. CALDWELL:

Q. Have you stated the result of the second suit against the Biograph Company on the release letters patent affecting the camera? A. The result of that suit, as I recall, was the granting of an injunction, enjoining the Biograph Company from using the Warwick camera, which was a

1 positive feed camera of the type now universally used, and which is known generally as the Edison camera. I might say, concerning this camera release patent, that a motion for a preliminary injunction was argued against the Selig Company in the Fall of 1907, and an injunction granted, or at least, we were in position to take an injunction, and I think an injunction was also granted against Lubin, in Philadelphia, on the camera release.

Q. Is it not a fact that Judge Kohlsant of the United States Circuit Court in Chicago, handed down an opinion directing the issuance of an injunction against Selig? A. That is so.

Q. Do you recall the date of that decision? A. I do not, except that was in the Fall or early Winter of 1907.

Q. Had proceedings for an accounting been commenced against the Biograph Company after the decision of the United States Circuit Court of Appeals early in 1907? A. Yes, those proceedings were being gone ahead with, and, as I remember, were in charge of Mr. Bull.

Q. Were they pending at the time of the settlement of the so-called warfare between the Edison and the Biograph interests? A. Yes.

3 Q. Do you recall what happened in the suit that you brought against Lubin under the second camera release? A. Not specifically, except that as I remember it, we either had an injunction against Lubin or were in a position to take an injunction.

Mr. GROSSVENOR: May I interrupt with a question? Mr. Caldwell, do I understand that you are going to submit a list or memorandum with dates respecting all this?

4 Mr. CALDWELL: We expect to do that, yes. Mr. GROSSVENOR: I suggest that before you examine the witness in these matters, that you have that list ready, so that he can refresh his recollection and we can proceed more intelligently.

Mr. CALDWELL: That is a question of the order of proof. I think that it would be convenient to have that list ready, but it does not happen to be ready at the present time.

Mr. GROSSVENOR: I am afraid this testimony is going to be somewhat misleading if it is going to be

given by these general conclusions and if the witness has not anything before him to refresh his recollection.

Mr. CALDWELL: I do not think so. I do not think the witness will be intentionally misleading.

By Mr. CALDWELL:

Q. Now, I think you have stated that suits were brought against Eberhard Schneider and the Vitagraph Company and Moles, Pathe Cinematograph Company and J. A. Berst. Do you know what happened in those suits? What the result of them was? A. Are you speaking now of the release?

Q. The re-issue. A. Those suits were held up pending the determination of the Biograph suit, except as I have stated, the motion for preliminary injunction against Selig and possibly also, against Lubin.

Q. After the decision of the United States Court of Appeals, the second decision in the Biograph case, which, as you have stated, was followed by the decision of Judge Kohlsant in Chicago, holding that the so-called Lumiere and Selig cameras were also infringements of the Edison camera, what happened?

Mr. GROSSVENOR: I object to this testimony so far as it purports to give the conclusions or opinions of the Court, the proper evidence being those opinions; and then, I further object to this last question as in my opinion, he is stating that the witness has testified to certain things, which it is my understanding he has not testified to thus far.

Mr. CALDWELL: The principal opinion to which I refer, you have already introduced in evidence. The opinion of Judge Kohlsant is, however, not in evidence as yet. We will put it in.

By Mr. CALDWELL:

Q. Well, what happened in the Fall of 1907, or Winter of 1907 and 1908, Mr. Dyer? A. With the successful termination of the litigation in favor of the Edison camera patent, which was held to cover all existing practical motion picture cameras—

- 1 Mr. GROSVENOR (interrupting): I object to this as being merely the statement of the conclusion of the witness as to what the decision did hold, and, therefore, as being improper.

The Witness (continuing): And since these cameras were being used by all the American manufacturers who had, during the Edison-Biograph litigation, developed their enterprises, they realized that their position was precarious—

- 2 Mr. GROSVENOR (interrupting): I object to that as improper, stating what other people realized, and then giving the reason as in his judgment.

By Mr. CALDWELL:

Q. Is that the result of conversations that you had with the manufacturers, Mr. Dyer? A. Yes.

Mr. GROSVENOR: Then, call the manufacturers to testify as to the reasons that actuated them.

- 3 Mr. CALDWELL: I think it is competent for the witness to testify to general conditions prevailing at the time, as the result of which, certain action was taken.

Mr. GROSVENOR: He has not qualified to testify as to what motives may have actuated others. I want to enter my objection. Now, proceed, witness.

The Witness (continuing): Because all the American manufacturers realized that the Edison Company would be successful, as it was in the case of the Selig Company, in enjoining them from the use of their cameras, and, therefore, from making motion pictures in the United States, therefore, all the American manufacturers, with the exception of the Biograph Company, came to the Edison Company and received licenses under the Edison camera and film reissues to permit them to lawfully carry on their business. These licenses were granted in the early part of 1908.

By Mr. CALDWELL:

Q. Why was the suit against the Biograph Company selected as the test suit in the case?

Mr. GROSVENOR: Test suit of what?

Mr. CALDWELL: On the camera.

Mr. GROSVENOR: Which suit are you referring to against the Biograph Company?

Mr. CALDWELL: I am referring to the second suit. The suit on the re-issue.

A. Well, in the first place, the Biograph Company already had been sued under the original patents, and we felt that it was up to us to test the re-issue patents in the second suit against them, and not give up in our efforts to enforce the rights of the Edison Company. Then, there was also more or less personal feeling between the two concerns, a feeling of bitterness, but principally as a matter of legal tactics, the suit against the Biograph Company was selected as the test case, because the Biograph Company was making use of two cameras, one known as the Biograph camera, and the other, the Warwick camera. There was some doubt as to the infringement of the Biograph camera, but we felt that we ought to proceed against both, and then, if we were successful, there would be no difficulty in getting preliminary injunctions against other infringers. Or, if we were successful only on the Warwick camera, as was actually the case, we still could get preliminary injunctions against other infringers. If, however, suit had been brought against any other infringer, while we would have been successful in securing an injunction, yet, if we then went against the Biograph Company, the question of the infringement of the Biograph camera would have to be gone all over again, and we considered that it was therefore better to proceed with the suit against the Biograph Company than against the others; in other words, it was the most unfavorable suit.

Q. Was the Biograph Company an active competitor of the Edison Manufacturing Company at that time? A. Yes.

Q. And its largest competitor among the domestic producers of motion pictures? A. It was.

Q. And did that fact have anything to do with your

1 selection of that case as the test case? A. Yes. That was also a consideration.

Q. Now, what were the considerations that led Mr. Edison to conclude to license these infringers under his patents instead of stopping them altogether?

Mr. GROSVENOR: I object to this question as being improper in asking as to the reasons that actuated a third person and not the person testifying. The proper way is to call the person respecting whom the question is asked.

2 Mr. CALDWELL: This witness at that time was the active representative of Mr. Edison, who conducted these operations.

Mr. GROSVENOR: He is qualified to testify the reasons that may have actuated himself in giving advice, but certainly he is not qualified to testify as to Mr. Edison.

By Mr. CALDWELL:

3 Q. These licenses were issued pursuant to instructions from Mr. Edison, were they not, Mr. Dyer? A. Yes. After being fully explained to him and having been approved by him.

Q. Now, I think, you may answer the question. A. What was the question?

The stenographer repeats the question as follows:

4 Q. Now, what were the considerations that led Mr. Edison to conclude to license these infringers under his patents instead of stopping them altogether? A. Mr. Edison wanted to make as much money as possible out of his patents, and therefore, by these licenses—

Mr. CALDWELL (interrupting): Before you proceed, Mr. Dyer—these patents at that time were owned by the Edison Manufacturing Company, were they not?

The Witness: Yes, sir.

By Mr. CALDWELL:

Q. That was a corporation, wasn't it? A. That was a corporation, owned practically by Mr. Edison.

Q. And you were the Vice-President of that corporation, were you not? A. I was.

Q. And practically charged with the executive management of that company? A. Not at that time. I was general counsel.

Q. You were Vice-President of the company? A. Not at that time. I was the Vice-President in July, 1908. At that time, I was the general counsel advising with Mr. Gilmore, who was the Vice-President.

Q. You may proceed, A. Mr. Edison—

Q. (interrupting): By Mr. Edison, you mean now the Edison Manufacturing Company, do you not? A. Yes. The Edison Manufacturing Company was practically Mr. Edison, because he owned all the stock, or substantially all the stock, of it—wanted to make as much money as possible out of his patents. He felt this could be done only by licensing concerns to use the patents upon the payment of royalties. It was also felt by the Edison Manufacturing Company that the concerns that were in business and that were infringing, had probably entered the field without a proper knowledge of the patent situation, and that it would be harsh and oppressive to force them to retire. Furthermore, the Edison Manufacturing Company did not have the facilities to supply the market for motion picture films at that time, and if the company had pressed its advantage to its ultimate conclusion, it could not have supplied the motion pictures that it would drive out. These, I think, were the principal reasons why it was decided to license infringers instead of trying to close them up.

4 Q. Did those who were licensed comprise all of those engaged in business at that time, with two exceptions? A. Yes. All the manufacturers were licensed except the Biograph Company, and the only outsider was Mr. Kline, who was an importer of films, and who allied himself with the Biograph interests.

Q. One of the witnesses called by the petitioner in this case, Mr. Swarth, has testified that in 1908, and prior thereto, the films were not sold as patented articles, is that statement correct so far as the films sold by Mr. Edison or

1 the Edison Manufacturing Company are concerned? A. No, it is not correct. The Edison films were stated to be patented, and, I think, the date of the patent was printed as part of the main title of each film, so that the patent date would be thrown on the screen when the film was projected. I am quite sure also that the fact that the film was patented was extensively advertised by the Edison Manufacturing Company and also, that the fact that the film was patented was also marked on the boxes containing them. I think this information was disseminated as widely as possible by the Edison Company.

2 Q. State what part, if any, you took in bringing about the so-called Edison license arrangement in 1908? With what manufacturers you conferred, if any, before the license agreement was put in the form in which it was finally executed. A. The first knowledge I had specifically of any proposition to grant licenses was early in 1908. Mr. Alexander T. Moore, at that time manager of the Kinetograph department of the Edison Manufacturing Company, came into my office at Orange, and handed me a proposed license agreement between the Edison Company and Pathe Freres, and asked me to look it over and advise him if it was correct in form. I took up this agreement with Mr. Gilmore, who at that time was Vice-President of the Edison Company, and thereafter the license agreement was developed by Mr. Gilmore and myself. I do not recall what the exact form of the first agreement was that Mr. Moore submitted to me, or what suggestions in the final agreement were made by Mr. Gilmore, or what by myself. We wanted to get an agreement that would be acceptable to Pathe Freres, because that concern was a dominating factor in the motion picture business at that time.

4 Q. Commercially, you mean? A. Commercially. And we felt that the contract that would be accepted by Pathe Freres would be acceptable to the other proposed licensees. This work took place in the early part of 1908, and the agreements were executed, as I remember, in the Spring of that year. The only manufacturer that I recall talking with at the time when the form of the contract was being discussed, was Mr. Berst. I think I also saw some of the manufacturers at the time the agreements were executed by them, but I do not recall anyone specifically, except Mr.

Speer, who I remember very well coming down to New York for the purpose of executing his license agreement.

Q. You have stated that these agreements were executed in the Spring of 1908. I want to call your attention to the date of the agreement between the Edison Manufacturing Company and the Kalem Company, which is attached to the answer of the Edison Company in this case, and which is in evidence as Puttlinger's Exhibit No. 92, and I ask you to look at that date and see if that refreshes your memory as to the time when these license agreements were executed? A. Yes. In referring to the Spring, I had in mind, possibly the 1st of February.

Q. What was the date of that agreement? A. The date of this agreement is the 31st of January, 1908.

Q. That is about the time when the other agreements were executed, was it? A. I think that is true of all the agreements, except in the case of Pathe, and there was delay in executing the Pathe agreement, as I remember it, owing to the fact that Mr. Berst stated that the actual execution of the agreement had to be first referred to his principals in Paris. He stated he had not any doubt that they would approve it, but he had to get their formal consent first, as I remember it.

Q. But in point of fact, did not Pathe Freres commence to operate under the agreement at the same time as the other licensees? A. He did.

Q. All of these agreements were substantially uniform, were they not, in terms? All alike, with two exceptions? A. Yes, sir. They were all alike, except that in the case of the Pathe Company and in the Melies agreement, there was either a separate agreement, or else the main agreement was modified to provide that those concerns should be given the right to import foreign negatives from which positive prints could be made, and also to import, under certain conditions, foreign made positives. These two concerns were the only ones of the licensees who had foreign affiliations. The Melies Manufacturing Company were not importing negatives, and therefore, it was not necessary that their licensees should include this privilege.

Q. Why were all of these agreements made uniform in character? A. As a matter of business fairness, we felt that all the licensees should be treated alike. It was also more convenient to use the common form.

1 Q. When you took up with the exchanges under the Edison regime, the matter of contracts, were uniform contracts made with each exchange? A. Yes, sir.

Q. Why did you consider that that was necessary? A. Because it would have been an endless task to have negotiated separate agreements with a large number of exchanges. It was much more convenient and much more fair to treat them all alike.

2 Q. It is in evidence that there was a conference or convention of motion picture men, principally exchange men, in the City of Buffalo, early in 1908. Were you present at that conference or convention? A. I was. I went there with Mr. Gilmore.

3 Q. Will you state what transpired there, so far as you know? A. That was a convention of a large number of exchanges. I think most of the exchange men of the country were there; certainly the most important exchange men were there. It was a meeting, as I recall, of a body known as the Film Service Association. At that meeting I addressed the members of the Association and explained to them that the Edison camera patent had been sustained in our suit against the Biograph Company, and that all the American manufacturers except the Biograph Company had decided to recognize the Edison patents, take licenses under them, and pay royalties to the Edison Company, and that those licenses were subject to certain reasonable conditions. I stated that up to that time the exchanges, in handling film that had not been licensed under the Edison patents, had infringed those patents just as effectively as if they had made the film themselves, and that it was the purpose of the Edison Company to license exchanges under the Edison patents, so that they could handle licensed films legitimately and without danger of infringement. And at that time I read or explained the provisions of the proposed exchange license to the several exchanges, so that they would understand it. I also had several of the exchange men come up to me afterwards and ask questions about the proposed exchange license, and I endeavored to make it clear to them what it was designed to cover.

4 Q. Was any objection made, so far as you recall, as to the terms of the exchange license? A. No. The exchange men seemed to be very hopeful that, as a result of the cessation of the warfare between the conflicting interests and

the licensing of the industry, that conditions would improve, so far as their business was concerned. I think that they generally approved the exchange license, and I do not recall that any of them objected to it.

Q. Did any of them express any fear that the exchange business, if conducted under the conditions that had been prevailing theretofore—that it would not last long? A. That feeling seemed to be in the atmosphere.

Q. Do you recall, Mr. Dyer, a provision in the license exchange agreement between the Motion Picture Patents Company and the exchange, by which the exchange is obligated to lease a minimum of twenty-five hundred dollars' worth of film per month? Do you know what the origin of that provision was? A. Yes, I think the origin of that provision was one of the rules of the Film Service Association that the exchanges had imposed upon themselves, providing that no exchange should be a member of the Association unless it purchased twelve hundred dollars' worth of film per month.

Q. I call your attention to Petitioner's Exhibit No. 2, page 627 of the record, which is Article II of the by-laws of the Film Service Association, and ask you to read Sections 2 and 3 of those by-laws, and see if that is what you are referring to as the self-imposed condition by the exchange men.

Mr. GOSWENOR: I object to this as immaterial.

A. Yes, sir. The two sections read as follows:

"Section 2. For the purpose of membership in this Association a 'legitimate film-renting business' shall be one equipped to do a self-sustaining film-renting business independent of any other office or concern, that purchases new film for renting purposes to the average amount of at least \$1,200 per month.

"Section 3. Any eligible individual, partnership or corporation desiring to become a member of this Association shall sign a written application for membership, stating the name and office address of the applicant, the names of the partners, the names of the officers or directors, if a corporation, and the

1 name of the person who will represent the membership in the Association in the case of a partnership or corporation, that in how many, if any, moving picture shows the applicant is interested, either directly or indirectly, and the names under which they are operated, and whether the applicant will, if elected to membership, give a pledge not to rent film to any person or persons whom the applicant knows to be renting it."

2 This is the basis of my previous answer.

By Mr. CALDWELL:

Q. After the formation of the Patents Company, the minimum requirement was changed from \$1,200 to \$2,500, was it not? A. Yes, sir.

Q. And can you assign any reason why the minimum was increased under the Patents Company licensing arrangement? A. My recollection is that this increase was made at the suggestion and request of the exchange men themselves, who represented to us that at that time the exchange that did a smaller business than \$2,500 per month in the purchase of films, would not be self-sustaining, and therefore, would be open to the temptation of objectionable practices, particularly duping, which was a common practice at that time. I know that there were at least three good sized duping plants in Chicago, Philadelphia and San Francisco, that I was informed were doing a prosperous business. Duping was a great vice.

Q. Could an exchange satisfactorily serve its customers if it took less than that amount of film per month? A. I do not think so.

4 Q. Did the Edison Manufacturing Company, or, as far as you know, any other manufacturer, have anything to do with the preparation of the by-laws of the Film Service Association? A. No, sir.

Q. Was the Edison Company a member of the Film Service Association? A. No, sir.

Q. Do you know whether any of the other manufacturers were members? A. I don't know personally, but there were some manufacturers, namely, the Vitaphone Company, Lubin, and Spoor, who were interested in the

1 exchange business, and it is probable that those manufacturers or individuals connected with them, were members of the Association. I am quite sure that Mr. Rock was a member of the Association, representing the Vitaphone Company. I would like to say, however, that the Vitaphone Company of America, which is essentially a producing concern, was different from the American Vitaphone Company, which was the exchange concern. They were two corporations, but the trade frequently confused them.

Mr. GRAYSON: They were owned by the same people?

The Witness: By practically the same people, yes, sir.

By Mr. CALDWELL:

Q. Mr. Swanson, a witness called on behalf of the Government, has testified that all of the manufacturers were members. Then that statement is inaccurate? A. Absolutely.

Q. I show you Petitioner's Exhibit No. 92, introduced in evidence on page 368 of the record, but not copied in the record, but identified as the exhibit attached to the answer of Thomas A. Edison, Incorporated, and the same being the license agreement between the Edison Manufacturing Company and the Kalem Company, dated January 31st, 1908. Do you identify that as one of several similar agreements executed between the Edison Manufacturing Company on the one side, and certain other persons as li- censees? A. Yes, sir.

Q. With what other persons were similar agreements entered into at or about that time? A. S. Lubin of Philadelphia, later known as the Lubin Manufacturing Company; the Essanay Company of Chicago, Solig Polyscope Company of Chicago, Pathé Freres, the Vitaphone Company; and George and Gaston Melies. In the case of the Pathé and Melies licenses, they were the same, except that they provided, as I have before explained, for the importation of foreign negatives and the printing of positives in this country, but whether this change was in the agreement itself or the subject of a supplemental agreement, I do not now recall.

1 Q. At the time those agreements were entered into, the Edison Manufacturing Company, the licensor, was itself actively engaged in the production of motion pictures, was it not? A. Yes, it was one of the largest producers.

Q. And was it in active competition with these seven persons and corporations that you have just named? A. Yes, sir. Did I name seven? Did I have all of them?

Q. I think you have named seven. And after the execution of these agreements, it continued in the business of manufacturing motion pictures, did it not? A. Oh, yes.

2 Q. And in active competition with the seven licensees? A. Yes, it was in active competition and developing all the time.

Q. So that at the time these agreements were executed, the Edison Company sustained a dual relation, did it not, to the subject matter of these agreements? A. Yes.

Q. What was that relation? A. The Edison Company, in the first place, was the owner of the dominating patents and occupied the position of the licensor with respect to the several licensees, and also was a manufacturer or producer of motion pictures, and therefore occupied the relation of competitor with its own licensees.

3 Q. Did all of these agreements subject the licensor, that is to say, the Edison Manufacturing Company, to the same terms and conditions as the licensees? A. All except the payment of royalties.

Q. The value of a license to manufacture and sell under a patent depends, in a large measure, does it not, on the exclusiveness of the rights that are conferred, or, in other words, the number of licenses to be issued under the patent? A. I think so. I think that is the general experience of patentees.

4 Q. In negotiating the terms and conditions of these licenses with the various persons who subsequently became licensees, do you know what, if anything, was said by any of them as to the number of licenses that were to be issued?

Mr. GOSVINCOR: Are you talking about the rental exchange licensees or the manufacturers' licensees?

Mr. CALDWELL: I am speaking of the manufacturers' licensees.

Mr. GOSVINCOR: And this was prior to the for-

mation of the Patents Company, and related to the period of the Edison licensees, so far?

Mr. CALDWELL: Exactly.

Mr. GOSVINCOR: Thank you.

The Witness: Yes, sir; the idea was to confine the licensees to those producers of motion pictures who were then in business, or at least those whom we knew of, and not to extend the number as new concerns entered the business, unless the licensees agreed to it, or a majority of the licensees.

2 Q. Do you know whether a license was offered to the Biograph Company and to George Kleine at that time? A. Yes, sir, we offered a license to the Biograph Company, but they refused to be licensed.

Q. Then the disposition of the Edison Company at that time was to license the entire art as it was then known, or as it then existed? A. That is what we planned to do.

Q. But you could not agree with the Biograph Company and George Kleine as to the amount of royalty to be paid, is that correct? A. That is the reason why they did not accept the licenses from the Edison Company.

3 Q. Do you know whether or not any of the persons or corporations who entered into these license agreements with the Edison Company, contemplated at the time making additional investments in their business after obtaining licenses?

Mr. GOSVINCOR: I object to that as immaterial.

A. Yes. I recall very well that after the licensees were finally executed and the strain and stress was over, that several of the licensees, notably the Vitaphone Company, Mr. Lubin, Mr. Selig, and Mr. Spoor, told me that they now felt that they were in position to go ahead with safety and invest capital in their business, so as to develop and greatly improve the character and tone of their pictures. The impression I got from them was that they had not made any more investments than were absolutely necessary, because of the fear they had of losing their investment as the result of patent suits.

4 Q. I call your attention to the provision contained in Paragraph 20 of the exhibit which I have already shown you. You may state what provision there was in that para-

1 graph as to the number of licenses which might be issued under the patents and under what conditions additional licenses might be issued. A. The paragraph in question which appeared in all the other license agreements, provides that in addition to the license of the Edison Company and Kalem Company, six other similar licenses might be granted, making a total of eight.

Q. A total of eight licenses, or a total of eight manufacturers under the license, including the licensor? A. Making a total of seven licensees, and one licensor. The agreement provides that additional licenses might be granted by a plurality vote of the licensor and licensees, based on the running feet of new subjects issued by the licensor and licensees during the year preceeding the taking of the vote. The paragraph also provides that in case of the termination of any license, the licensor should have a right to appoint a new licensee in place of the one that was ended.

Q. Why were the licensees granted a voice in determining whether or not additional licenses might be granted?

1 Mr. GROSSVENOR: This questioning refers not to the Patents Company licenses, then?

2 The Witness: No. These were the Edison licenses.

3 Mr. GROSSVENOR: Thank you.

4 The Witness: By the grant of these several licenses, the patent property or territory was divided practically into eight parts, each manufacturer having one-eighth. Just exactly the same as in the case of an exclusive license, the one licensee has the whole. Therefore, to grant an additional license or licenses, would reduce the interest of each licensee. The licensees agreed to pay substantial royalties under the patents, based upon a certain understanding, namely, that the number of licensees should be limited, and it seemed entirely reasonable to me at the time and does so now, that they should have a right to decide whether additional licenses should be granted. I doubt very much if they would have consented to pay the royalties they did if they had felt that the Edison Company could indiscriminately license anyone who might appear in the field.

Q. Was there much discussion or controversy over the question as to the amount of royalty to be paid between the Edison Company and the licensees, prior to the agreement?

A. Oh, yes.

Q. Before they arrived at an agreement? A. Oh, yes, that was the result of considerable dickering back and forth. We were trying to get as much as we could, and the licensees were trying to pay as little as they could. That always happens with license agreements.

Q. I call your attention to the following provision contained in Paragraph 4 of that license agreement, namely: "That the licensor and licensees will use exclusively sensitized film approximately 1 3/4 of an inch or 35 millimeters in width, or narrower, manufactured and sold in the United States under authority from the licensor, and called in that license agreement licensed film, and that they will not purchase or otherwise acquire or sell or otherwise dispose of or deal in motion pictures produced on or by the use of any other film than such licensed film, nor sell nor otherwise dispose of any negative motion pictures." What was the purpose of limiting the licensees to the use of film 1 3/4 inches or narrower? A. That was the standard width of motion picture film, namely, 35 millimeters, and we were dealing with the practical existing conditions at the time. The provision regarding the use of narrower film was put in the licenses because several of the licensees were discussing the possibility of putting out a small household machine, and we wanted the license to include the handling of film for this purpose. The Pathe Company and the Edison Company as a matter of fact did, at a later date, put out machines of that type, using film of a less width than 35 millimeters.

Q. It was never intended or contemplated, however, that the so-called household machine should ever give exhibitions for profit, was it? A. No. The household machine was simply a reduced form of toy. It was to be used only in the home. Something like a phonograph.

Mr. CALDWELL: I think this might be a convenient time to stop. I would like to examine Mr. Dyer on another subject now that I would not like to break into.

Mr. GROSSVENOR: We had better have a little longer

- 1 session this afternoon then. We have lost about twenty minutes out of the two hours.
 The Examiner: Shall we meet again at 2 o'clock.
 Mr. CALDWELL: 2:30, the usual time.

The Examiner: The hearing is adjourned until 2:30 o'clock this afternoon at the same place.

NEW YORK CITY, November 10th, 1913.

- 2 The hearings were resumed, pursuant to adjournment, at 2:30 o'clock P. M., November 10th, 1913, at Manhattan Hotel, New York City.
 The appearances were the same as at the morning session. Thereupon FRANK L. DYER resumed the stand.

Direct examination continued by Mr. CALDWELL:

- Q. Mr. Dyer, you have stated that the Edison films were sold as patented articles both prior and subsequent to the Edison licensing arrangement in 1908. I show you a line label with the following printed on the back of it: "Edison Clear Projecting Film. Subject." Followed by some blank lines on which to place the title of the picture. "Length... Feet," which is followed by this printing: "This film is made and sold under the Edison Patent No. 589,168, dated August 31, 1907. Imitation or duplication thereof will be prosecuted. Manufactured by Edison Mfg. Co., Orange, N. J., U. S. A." and I ask you if that is one of the labels that was in common use in the sale of the Edison film prior to the time of the re-issue of the film patent? A. Yes. I recall seeing film boxes containing this label at or about the time I moved down to Orange, in April, 1909—possibly it was before that time, because I spent a good deal of my time at the Edison Laboratory from the year 1898 to the year 1903.

Mr. CALDWELL: I offer it in evidence.

Mr. GROSSVENDOR: I want to ask one or two questions before I decide whether I will make objection. This small round disk names only Edison Patent No. 589,168, dated August 31, 1897. Then, I suppose, this

- 1 label was used before the decision of Judge Wallace on that patent, which I have named, and before the reissue, for the reason that no reissues are named on this label?

The Witness: It was used apparently before the reissue, and after the date of the patent. The patent mentioned on the label is the original patent.

Mr. GROSSVENDOR: Yes, but it does not state the numbers of the reissues, or refer to the reissues, therefore it is to be presumed the label was used during a period antedating the issue of the reissues?

The Witness: That is correct.

Mr. CALDWELL: That was my question.
 The label offered is received in evidence and marked "Defendants' Exhibit No. 105. E. H."

Defendants' Exhibit No. 105. E. H.

EDISON CLEAR PROJECTING FILM.

Subject

.....
 Length.....Feet.

This Film is made and sold under the Edison patent No. 589,168, dated August 31, 1907.
 Imitation or duplication thereof will be prosecuted.

Manufactured by
 EDISON MFG. CO.,
 Orange, N. J.,
 U. S. A.

(Large capital "A" in brown ink in center.)

By Mr. CALDWELL:

Q. I show you another label with red printed matter on the back, reading as follows: "Trade Mark. Thomas A.

- 1 Edison. Patented August 31, 1897. Released Sept. 30, 1902.
Released Jan. 12, 1904. No. Length. Feet. Title,
with a space for the title of the subject, followed by the
restriction that it shall not be used for duplicating or printing
other films from it. Any use of it for such purposes is an in-
fringement of the above patents under which it is made and
sold. Manufactured by Edison Mfg. Co., Orange, N. J.,
U. S. A., and I ask you if that is a form of label that was
used on all motion pictures sold by the Edison Manufactur-
ing Company subsequent to the dates of the reissued letters
patent referred to on the face of it, and up to the time of the
Edison licensing arrangement in January, 1908? A. Yes; as
I recall, this is a label that was being used in connection
with what was called "Class A Film."

Mr. CALDWELL: We offer that label in evidence.
The label offered is received in evidence and
marked "Defendants' Exhibit No. 106. E. H."

Defendants' Exhibit No. 106. E. H.

- 3 Trade Mark
THOMAS A. EDISON
Patented August 31, 1897.
Released Sept. 30, 1902. Released Jan. 12, 1904.
No. Length. Ft.
Title.....

NOTICE

4. This film is sold subject to the restriction that it shall not be
used for duplicating or printing other films from it.
Any use of it for such purposes is an infringe-
ment of the above patents under which
it is made and sold.

Manufactured by
EDISON MFG. CO.,
Orange, N. J.,
U. S. A.

(Large red capital "A" printed in center.)

By Mr. CALDWELL:

Q. Referring again, Mr. Dyer, to Petitioner's Exhibit No. 92, dated January 31, 1908, and to the provision contained in paragraph 4, which provided that licensees should get their raw stock from the manufacturer named by the licensor. What was the purpose of confining the licensee to the use of raw film manufactured and sold in the United States by a person or persons authorized by the licensor? A. The purpose of this particular provision is this: The Edison Company, as I have stated, in addition to being the owner of the patents, and the licensor, was also the producer of moving pictures, and, therefore, a competitor of the licensees. The licensees were very jealous, apparently, of their business, and objected to the Edison Company, as a competitor, knowing how much business they were doing. Therefore, the provision was made that the royalties should be collected by the licensed manufacturer of raw film from the several licensees, and turned over to the Edison Company in bulk, without divulging the amount that might be contributed by any individual licensee. Furthermore, the Eastman Kodak Company, that was designated as the licensed raw film manufacturer, was the manufacturer of the best film available, and we desired to have licensed pictures put out on the best possible film so as to gradually improve the condition of the business. The principal reason, however, was to devise a scheme by which the royalties could be collected without divulging the amount contributed by each licensee.

Q. Did the Edison Company as the owner of the patents have any special interest in the selection of a high grade of raw stock? Did it have a separate interest there as distinguished from its interest as a manufacturer, and as the owner of the patents? A. Naturally that is so, because our idea was to try to develop the business on a high plane so that it would be prosperous, and become larger, and so that the royalties would therefore be greater.

Q. What was the purpose of the prohibition contained in that license agreement against the sale of negative motion pictures? A. Is that in the same paragraph?

Q. I think it is. Would the fact that the royalty was based both on the amount of the film used in the negatives, as well as in positives, have any relation to that prohibition? A. I think that is so. As I recall, the purpose of this pro-

1 inhibition was to prevent a licensee, who had legally manufactured a negative under the license, from disposing of that negative to some one on the outside who might produce positive prints therefrom without paying a royalty. We considered it desirable in granting licenses to tie the camera and film patents together, and prevent any possibility of the licensees in any way rendering support to any outside infringers.

Mr. GROSVENOR: 'In using that term "film patent" in that sentence just read, are you referring to the patent Eastman had?

The Witness: No, I am referring to the Edison release film patent.

By Mr. CALDWELL:

Q. Is that all you wanted to say on that subject? A. Do you wish me to elaborate?

Q. No, I simply wanted to know whether you had finished your answer? A. Yes.

Q. I call your attention to the following provision in the same paragraph of this agreement: "The Licensor covenants and agrees, upon the execution of this agreement, to furnish the licensees with the name or names of the manufacturer, or manufacturers of such 'Licensed Film' from whom the Licensor and Licensee shall purchase the same, and the Licensor agrees also to keep the Licensee promptly informed hereafter, from time to time, of the name or names of any other or additional manufacturer or manufacturers authorized by the Licensor to make such 'Licensed Film' and from whom the same may be purchased."

Q. What name or names of manufacturers of raw film did the licensor give to the licensees after the execution of this agreement? A. The Eastman Kodak Company.

Q. Why was the Eastman Kodak Company selected? A. It was known that the Eastman Kodak Company would be selected because all the licensees were dealing with that company and getting film from it. The Eastman Company made the highest type of film then known, so that the quality of the pictures would thereby be assured, and, at the same time, the Eastman Kodak Company was a large and respon-

sible concern, and every one, both the licensor and the licensees, felt confident that the confidence required by the license would be observed by the Eastman Company. The Eastman Company, of course, was not specially referred to in the license because we did not know what the future would develop, and every one felt, of course, that if a new film should appear that was superior to the Eastman film, that such film ought to be placed at the disposal of the licensees.

Q. Was the Edison Company in any way interested other than as you have already stated in the Eastman Kodak Company? A. Not at all.

Q. Was it the intent of the agreement to give the Eastman Kodak Company a monopoly of supplying raw stock? A. No.

Q. Now, I call your attention to another provision contained in the third clause of paragraph 4 of that agreement, to the effect that the licensor will exact from each manufacturer of raw film authorized by it to furnish or sell such film to the licensees, an agreement in writing not to furnish such motion picture film to anyone but the licensor and its licensees—do you find that there? A. Well, it is a little different—

Q. (Interpreting) I am not pretending to quote the exact language. A. Yes—

Q.—Except to the extent of 2½ per cent of the total amount of licensed film of the width of 1½ inches, or narrower, supplied by such manufacturer to the licensor and said licensees during any one year, which amount the manufacturer was authorized to sell to persons not engaged in the motion picture business, with the further exception that the manufacturer might reserve the right to manufacture and sell sensitized films suitable for commercial production of negative and positive motion pictures of a width not to exceed approximately three-quarters of an inch to persons engaged in the motion picture business. What was the purpose of prohibiting the manufacturer from selling film of the standard width to persons other than the licensees? A. Any licensed film that might be sold in this country by a licensed manufacturer of raw film for moving picture work would necessarily be used in an infringing camera, and the manufacturer would therefore be contributing to the infringement. The purpose of the condition was to minimize

- 1 as much as possible infringements of the Edison patents. In
 a sense it amounted to a license to the raw film manufacturer
 under the Edison patents, or, in other words, a license against
 contributory infringement. My recollection is that this particu-
 lar provision later on was modified, or, at least, was
 not observed by the Eastman Company.

Q. In negotiating your contract with the Eastman Com-
 pany was it pointed out, do you know, to the Eastman Com-
 pany that if they sold this raw film to any persons other
 than the Edison licensees the Eastman Company itself would
 be a contributory infringer of the patents of the Edison
 Company?

Mr. GROSVENOR: Objected to as hearsay.

The Witness: Yes, that point was fully explained to the
 Eastman Company.

By Mr. CALDWELL:

- Q. You have stated that one of the purposes was to
 minimize or lessen the danger of infringement. To what
 extent, if any, do you think it had that result in actual op-
 eration? A. I am not able to say, but I think during the
 time the condition was observed it reduced infringements to
 some extent.

Q. Did you state why the exception was made in this
 restriction to the extent of two and one-half per cent. of
 the raw film sold by the Eastman Company? A. Yes, I re-
 member that this point was brought up by Mr. Eastman
 when we were discussing with him the advisability of this
 condition. He stated that to his knowledge there were a
 number of people in the United States who were taking up
 the moving picture work, more or less in an amateur way,
 for the purpose of taking pictures of subjects of natural
 history, etc., and he mentioned a friend of his in the Yellow-
 stone Park, who was making moving picture records show-
 ing the habits of wild animals. He stated he thought it
 would be for the public good to allow this work to go on
 even if it was an infringement; and therefore, this excep-
 tion was made, leaving it to the Edison Company to stop
 those infringements if it saw fit to do so.

Q. Why was the manufacturer of sensitized film left

free to sell film three-fourths of an inch in width or less to
 persons engaged in the motion picture business other than
 the licensor or licensee? A. That had to do with the pro-
 posed household or toy machines which it was thought
 might be made, and all of which would use film of the
 narrower width. We were dealing in these agreements
 with the standard film that had developed in the art, and
 could not very well tell what the development would be in
 other lines.

Q. I call your attention to the covenant contained in
 Paragraph 5—if you will refer to that—not to "sell, or
 otherwise dispose of, or offer for sale in the territory afore-
 said, unexposed positive or negative licensed film during
 the continuance of this agreement." What was the pur-
 pose of this provision? A. The purpose of that condition
 was to prevent licensees from securing the film and selling
 it to an infringer. I do not think there was any objec-
 tion to one licensee selling film to another licensee, which
 apparently would be covered by the condition, although
 that might have been something that we objected to.

Q. Explain what is meant by the use of "blank film"
 for "leaders," or "splicing," as the term is used in this
 paragraph? A. At the front of each picture is placed
 a section of blank or colored or tinted film, to take up
 the wear which is greatest at the end. A similar piece of
 blank film is used at the finish of the picture and it is
 called a "tail-piece." Ordinarily when two or more pictures
 are combined in a single reel they are separated by a few
 feet of blank film. Of course, any tough, flexible, perforated
 material, such as paper or cloth, might be used for these
 purposes, but there is a great deal of waste in connection
 with the production of these pictures, both at the studios,
 and in connection with the manufacturing operations, so
 that there is always a supply of blank film for these pur-
 poses.

Q. What was the purpose of the prohibition against the
 sale of second-hand positive or negative motion pictures,
 or motion pictures which have become used, or shopworn,
 or in any way damaged? A. The purpose of that condi-
 tion was to minimize the extent to which old worn out ob-
 jectionable pictures might appear in the art. It was along
 the same lines as the condition requiring the return of
 film after a certain period of use. We felt that it would be

1 just as objectionable to permit the licensee to sell old and worn out film as it would be to permit the exchange to retain old and worn out film for use in service. It would be difficult to place an exact point at which a second-hand picture might be objectionable, or not, so that the provision prohibited all second-hand pictures from being sold by the licensee.

Q. At the time of this licensing agreement in January, 1908, was the use of old and worn out film quite common in the business? A. Yes, they were very common. The moving picture art had developed so rapidly that the demand was greater than the supply, so that the pictures were subjected to terrific use, and many of them were very old and worn. These were called in the art "rainstorms," which were quite common. Pictures of this sort were used generally in vaudeville houses as chances to drive out audiences, and allow new people to come in. We felt sure that pictures of this sort would simply do harm to the business, and we had reason to believe that they were actually harmful to the eye. As a result of the conditions of this license agreement and subsequent license agreements relating to the return of old and worn out film, and prohibiting the sale of second-hand film, the condition of the motion picture art has been very greatly improved, and I doubt if any motion picture theatre now would put up for a moment with the objectionable films that were quite common in the art at the time the agreement was made.

Q. What is the meaning of the term "non-licensed motion pictures," as it is used in that agreement? A. A non-licensed motion picture is one produced or imported by anyone not licensed under the Edison patents.

Q. Now, I want to call your attention to Paragraph 6 of that agreement, which reads in parts as follows: "The licensor and licensee further mutually covenant and agree not to loan, rent out, sell, or offer for sale or otherwise dispose of in the territory aforesaid, motion pictures to anyone purchasing or otherwise obtaining, using, loaning, renting or selling, or offering for sale or otherwise disposing of or dealing in non-licensed motion pictures." What was the purpose to be subserved in prohibiting licensees from selling to persons dealing in non-licensed motion pictures? A. The purpose was to keep the licensees from giving aid, comfort and support to infringers. We felt that

if the licensees could supply film to infringers, they would thereby support infringers and give them better opportunity to carry on and extend their infringing operations.

Q. When you say, "we felt," you mean that the licensor felt? A. The Edison Company.

Q. Do you think that the agreement produced that result in whole or in part in its practical operation? A. I do. I think it reduced infringement.

Q. It was a provision at least tending to secure the patent owner in the exclusive enjoyment of his rights under the patent, is that right? A. That was the purpose of it.

Q. Referring now to Paragraph 9 of this agreement, which establishes a schedule of minimum prices, will you please state the reasons which actuated the licensor and licensees in fixing a minimum schedule?

Mr. GROSVENOR: It is understood, I take it, that the objections heretofore made will apply to all this line of testimony, that these questions are all immaterial—

Mr. CALDWELL (interrupting): I have not heard that objection before.

Mr. GROSVENOR: I think I have made it.

Mr. CALDWELL: You can put it on the record if you want to.

Mr. GROSVENOR: I will state it again, then, in order that there may be no question, that I object to all this line of testimony as to reasons or motives that may have actuated any of these people in doing any of the acts on the ground that these are immaterial. The motives are immaterial—whether the witness is asked to testify in regard to the motives that actuated them in making the agreements of January, 1908, or in regard to the motives which actuated them in making subsequent agreements, or any of the agreements in this case.

Mr. CALDWELL: In answer to that I will say that we are charged in the petition with having executed these various agreements with the motive of suppressing competition, and restricting competition, and establishing a monopoly. If the purpose which actuated the defendant in entering into these agreements is material as charged in the petition, it is clearly com-

1 potent for us to bring out the real motive which did actuate them.

Mr. GOSWORTHY: That question has not yet arisen, because all the testimony today, and all the questions so far addressed to the witness, relate to the agreements of January, 1908, which, as I recall the petition, are not even referred to in the petition; therefore my objection so far made is not contrary to anything set out in the petition regarding the purposes.

2 Mr. CALDWELL: The agreements of January, 1908, were the forerunners of the agreements of December, 1908, and I propose to connect the two in such a way as to make this testimony entirely admissible.

Mr. GOSWORTHY: All right; go ahead. I want my objection on the record.

By Mr. CALDWELL:

Q. Will you answer the question? A. There were several reasons why a minimum price was established. We felt that the motion picture art had great possibilities. In the early days, up practically to the time of the granting of these licenses, and even to a large extent at that time, most of the films used were exhibited largely because of their novelty. Some of these films simply showed little incidents and scenes, such as Niagara Falls, the American flag, the Empire State Express, waves washing the shore, and so forth. Some films had been made that were more or less dramatic, like the "Great Train Robbery" of the Edison Company, and a picture called "Personals" by the Biograph Company. These were probably the two best known pictures ever made up to that time. We felt that the art could progress along the lines of the drama, removing the motion picture from its field merely as an ephemeral novelty, to a standard form of amusement, and we believed that the competition between the producers should therefore extend along the line of quality of production, and not on price. So that a producer of these pictures, knowing what he could get per foot, would be able to put the greatest possible value in each foot of subject. The art has progressed since the granting of these licenses to a very remarkable extent, and is now no longer merely a novel form of entertainment that appeals to people because of its novelty, but is an assured and established form of

1 amusement, its popularity being probably greater than any other form of amusement in the world. In addition, a very important reason for providing for a minimum schedule, as I recall, was the fact that the Edison Company occupied the dual relation of licensor and competitor, and it was felt, and the fear was expressed by the licensees, that if the Edison Company should receive a large income annually in the form of royalties, they would be placed at an unfair advantage in competing with the licensees. Therefore a minimum price was fixed, which was designed to represent a fair average of prices then current, so that any such unfairness on the part of the Edison Company, should it choose to take advantage of its position, might be checked. I do not recall any others. I may think of something later.

Q. Did the establishment of that minimum schedule have any effect on the price of admission paid to motion pictures? Did it raise the price of admission to motion pictures in any way? A. No, not at all. The usual price of admission then, and at the present time, is five cents. In some localities the price is ten cents or more where the theatres are very large, or where the program is so long that the audience cannot be changed often, but the price at that time and now, or at least the usual price, is the minimum American standard of five cents, and that price could not be reduced, no matter how much cheaper the pictures might be made, any more than could the price of soda water or beer be reduced if the cost of production is increased.

Q. Was it believed by the licensor that the royalty which it was to receive would ultimately be greater if a minimum schedule were established, than it would be if no restriction were placed upon the licensees as to prices? A. Yes, it was felt that unless this and other conditions were imposed that tended to promote the eventual development of the business, the royalty would be less than if there were no conditions. We felt that—I said "we"; I mean the Edison Company—that by trying to do everything that we could within the territory of our patents to elevate the business and make it a more popular form of entertainment, that by doing so we would conduce to the success and prosperity of the licensees and consequently increase the amount of our royalties.

Q. This minimum schedule was binding upon the Edison Company, the licensor, as much as on the licensees, was it not? A. It was. The Edison Company was bound, so far as

1 its position as a producer of motion pictures is concerned, to all the conditions and stipulations of the license agreements, except the payment of the royalty.

Q. Was each manufacturer left free to charge what he pleased for his product, so long as it was not below the minimum schedule? A. Yes, sir.

Q. Was there any agreement or understanding between the manufacturers on that question, outside of the written agreements? A. No, sir.

Q. I think you have stated that the minimum price fixed in this schedule fairly represented the average of the price prevailing at the time the agreement was made. Is that correct? A. That is as I recall it, yes, sir. Some of the producers were selling at a lower price and others above this, but I think this was a fair average.

Q. Why did this paragraph of the agreement provide that a new minimum scale of prices might be adopted by a plurality vote of the licensor and licensees, based upon the output, 1,000 feet of new subjects, placed on sale in the territory covered by the agreement? A. No one would be able to say that a fair, reasonable price established at the time of these agreements might be fair and reasonable under different conditions. We felt the conditions might change, as, for example, substantial reductions in the price of raw material, which would permit a lower price in the finished picture, or increase in the investment, or increase in the salaries of actors, or increase in the character of the pictures required by the public, that would necessitate an advance of the minimum price. Therefore, since the minimum price could not be fixed immutably for all time, it is recognized that it should be subject to change when conditions required it. The licensees being competitors of the Edison Company, would not permit the Edison Company arbitrarily to change the price, because the Edison Company had a clear advantage of two or three hundred thousand dollars annually in royalties, which would enable them to fix a price that would be unfair to the licensees. It was felt therefore that the licensees should participate in the consideration of a change in price, and it was felt that the vote representing the relative size of the several licensees would be a fair way to determine that question. When I say relative size, I do not mean that the relative size of the licensees would be the same at all times as was the case when the license was issued, because

the particular manner of taking the vote was of such a character that under competitive conditions, the licensees might grow or be reduced in size, and their vote would correspondingly be changed. The idea was to provide a voting scheme that would take into account changes in the size of the manufacturers under the stress of competition.

Q. And those changes in size actually did take place, did they not? A. They did, in a very interesting way. For instance, when the Edison licensees were first formed, the Kalem Company had just been started, and it was such a small factor in the business, that we debated seriously whether we should recognize them and license them, but they were licensed, and since the grant of this license, the Kalem Company has developed in a very remarkable way in size and in the character of its pictures, so that at the present time it stands among the first four of the licensed manufacturers. In the case of the Essanay Company, the situation was about the same. They were a small, unimportant concern, that we thought a license might be refused to without particular injustice, but they were licensed, and have developed so that they are a very large, powerful concern now. On the other hand, the Pathe Company at that time was the predominant factor of the licensed interests, making much more film than anybody else—

Q. (interrupting): You mean importing much more film than anybody else? A. Putting out. Importing and putting out much more film than anybody else, and apparently setting a standard for all of us to follow, and under competitive conditions, the Pathe people have been pulled down from the top, and instead of making sixty per cent of foreign film as was the case in the early days, we are using only about ten per cent. And there has been change in the relative position of the Edison Company, and change in the position of the Lubin Company. In fact, there has been a gradual shifting up and down of the several concerns that started out under the Edison licensees from that time to this. All due to the efforts on the part of each to excel the other and to try to get up above their competitors if they could.

Q. What is meant by the term "new subjects placed on sale" as it is used in that paragraph? A. That means the negative footage of released subjects; in other words, if a manufacturer or producer was releasing four subjects a week of a thousand feet each, that would be four thousand

1 feet, so far as the vote was concerned, whether ten copies of each subject were disposed of, or fifty copies, as I remember it.

Q. What is the meaning of the term "standing order," which we find in Paragraph 10 of this agreement, and what was the purpose of the requirement that a standing order should remain in force for not less than thirty consecutive days? A. A standing order was an order placed for one or more prints of each subject released by the licensee. It was exactly like the subscription to a magazine, except that it could be cancelled on thirty days' notice. It provided for the continuous supply of pictures of that particular make under the order. It required some time to print up a number of copies from a single negative, and, therefore, it was necessary that time should be given to a manufacturer in cancelling a standing order, because if a manufacturer found himself with one or more prints on his hands that he had printed up under the belief that the standing order still stood, he would have difficulty in getting rid of them.

Q. Why were sales for export not covered by the agreement? A. Because the patents did not extend beyond the territory of the United States, we felt that we could not impose conditions on export sales. Of course, the films were produced in the United States, and therefore paid royalty, but what happened to them after they left the United States we had no control over.

Q. What was the purpose of the provision in Paragraph 12 as to special motion pictures, where it was agreed between the manufacturer and the person ordering the same, that the negative should be the exclusive property of the person ordering it, and positive prints to be made from time to time by the licensee on the order of such person, the price being fixed at \$1 per running foot for making the negative, and not less than fifteen cents per running foot for the positive printed from it? A. These special motion pictures were something outside of and apart from the regular business. It amounted to a very small part of the business, and, I think, still amounts to a very small part of the business. They were pictures that were made at the request of some outsider for a special purpose.

Q. By "outsider" you mean someone not engaged at all in the motion picture business in any of its phases? A.

Yes. For instance, the City of New York might want to have a picture taken showing the Street Cleaning Department. The Navy Department might want a picture taken, showing what a very pleasant life the American sailor leads. Manufacturers require pictures showing operations, for the purpose of impressing their customers. The National Cash Register Company has had a great many motion pictures made to illustrate questions of salesmanship. These were special pictures, the negatives being the property of the person or corporation for whom the picture was made. I remember the Southern Pacific Railroad Company had pictures made showing the development of the Texas lands. And there were quite a good many of them, but in the aggregate, compared to the amusement side of the business, they amounted to very little. The reason these particular conditions were imposed, was the same as in connection with the minimum price, the Edison Company being a competitor, could have gone out after this particular business and secured all of it at prices that the other licensees could not possibly have met, and it was felt that the price of a dollar per foot was reasonable. That would be only \$500 for a five hundred foot subject, which would involve sending a man and a camera and an outfit, generally are lamps, and so forth, sometimes to quite distant points. The price of fifteen cents was made higher than for the regular amusement pictures because generally not more than two or three copies were printed from these special negatives. But this part of the business was almost inconsequential.

Q. I call your attention to the provision contained in Paragraph 17 of this same agreement: "No sale except for export shall be made except under certain terms and conditions, one of which is that the purchaser shall return to the licensor or licensee, as the case may be, from time to time, such positive motion pictures that have been purchased, on the first day of every month, beginning with August 1st, 1908, an amount of positive motion pictures in running feet not purchased over six months before, and of the make of the licensor or licensee, as the case may be, to whom it is returned, equal to the amount that was so purchased during the sixth month preceding the date of such return." And I ask you what was the purpose of this requirement of the return of film? A. The purpose of this condition was to require the return of old, worn-out and

1 eye-impairing film, the idea being to improve the character of the exhibitions. As I recall, this particular condition was not imposed or was not insisted upon or carried out by the Edison Company, under its license agreements, but was later on embodied in the agreements with the Patents Company, and carried out by that company. The effect of the condition was to largely reduce the number of these objectionable films and improve the quality of the exhibition, and as the result of this improvement, our competitors, in order to meet our competition, are required to give exhibitions of films in equally good condition. The "rain-storms" that I spoke of in the previous answer, were bringing about a condition of disrepute, so that many people who saw motion pictures only in the vaudeville shows, looked upon them as very tedious and objectionable, in fact, in the old days, generally, the moment a motion picture appeared, everybody began to scramble out.

Q. Was it intended by this provision in any way to limit the quantity of film in circulation? A. No.

Q. Or to create an artificial market or demand for more film? A. No. The reason was to improve the character of the exhibitions by removing these very objectionable films from the market.

Q. In fact, did this return of film have any effect whatever on the supply of new film? A. I do not think so. I think that the conditions of this business are such that the film is passed through certain regular well-defined channels, and when they have passed through these channels, and have served their purpose, their usefulness has practically ended, and they might come back without detriment to anyone; in other words, there is a definite track over which the films pass. They start out at one end and come out at the other end, and when they come out at the rear end of the track, they have practically served their usefulness and further uses would only be to injure the public and injure the art.

Q. Now, viewing the question from the standpoint of the owner of the patent strictly, and not his interest as a producer of motion pictures, was this restriction as to the return of film of advantage to the patent owner? A. Yes. It was of advantage to the patent owner in the same respect that all these conditions were of advantage to the patent owner, namely, to improve the tone of the business, improve

the character of the business, change it from a side show proposition to a high-class theatrical proposition. That development has actually taken place. The very development that we expected and predicted. At the time the Edison licenses were made, almost the only theatres in existence were the small store shows. It was generally one room with some battered chairs in it, and a screen at one end, and the projecting machine at the other. The exhibition was given in absolute darkness. The place was badly ventilated, extremely dangerous in case of fire, and being in absolute darkness, terrible complaints of all kinds of immoral practices were made; in fact, the ordinary motion picture place was looked upon almost as a house of prostitution. By improving the character of the films, we have been able to cultivate the interest of cultured and refined people in them, so that the tone of the entire audience has improved, and as a result of that improvement, the reaction has necessarily benefited the owners of the patents.

Q. Was it believed that it tended to increase the revenues which he would ultimately derive from his royalties under the patents? A. Certainly. That is what I intended to say in few words.

Q. Could you say what percentage of any of the film returned to the manufacturer after the expiration of the six months was fit for further use for exhibition purposes? A. No, I could not. With a proposition involving thousands of films, it is impossible to lay down any fixed definite rule concerning each one. You will have to deal with general rules, and the general rule is that a film that is six or seven months old is pretty well worn out. Creditable exhibitions cannot be given with it. Of course, in actual practice, films are sometimes returned that are not worn out. They are returned because the public will not permit their exhibition. Recently with our company, we had a film that was put out that was of an advertising nature, and the theatres refused to run it because they refused to advertise the goods of anyone. Then sometimes a film will be worn out very quickly because it is very popular, and will be subjected to the greatest amount of usage in the first two or three months. That kind of a film would be returned. And sometimes we are unfortunate enough to have a film ruined the first week or the first day or the first time it is run through the machine, due to the imperfect operation of the projecting ma-

1. chine, or the stupidity of some operator, and such a film as that is returned,—so that it is impossible to have any fixed rule that applies to all films, but taking the question from all angles, I think that it can be said that the average film that has been run under average conditions six to seven months is worn out and ought to be returned.

Q. And that had been the actual experience of the Edison Company as a producer of motion pictures at the time this agreement was made? A. Yes, sir. We wanted to give the films their full measure of life, but get them back before they did harm.

2. Q. Paragraph 7 provides that the licensor and licensee shall mark conspicuously on the labels which shall be placed on the boxes or packages containing motion pictures, certain terms and conditions of sale, which labels were to be headed as follows: "Licensed motion pictures patented in the United States, August 30th, 1897, reissued January 12th, 1904. The enclosed motion picture is sold upon the following terms and conditions." Then follow four conditions under which the picture is sold, the first of which is that the purchaser shall not re-sell the same, but shall have only the right to use it in giving motion picture exhibitions or to rent it out. Do you know in point of fact whether the labels on the boxes containing motion pictures manufactured and sold by the licensees and the licensor and required to be so marked, were, in point of fact, so marked, in accordance with the printed conditions required by this paragraph? A. So far as I know, that is so. It was certainly so in the case of the Edison Company and I believe it was so with the other licensees, because we saw that they received these labels, and I have occasion to see a good many pictures put out by the other licensees, and they all contain this label on the box.
4. Of course, I was quite interested in this particular proposition, and would have noticed if the label had not been on the box.

Q. In Paragraph 18 the licensor and licensee covenant that they will not dispose of the motion pictures by loaning them or renting them to others, nor use them for the purpose of giving exhibitions thereof for profit. What was the purpose to be subserved by that covenant? A. The reason for the restriction or condition against loaning or renting films to others was to prevent the licensees from avoiding the other condition of the license relating to the minimum price,

in other words, the licensee might interest itself in one or more exchanges, and lend or rent its films to that exchange at a low price. That is my present recollection of this particular condition. The restriction regarding exhibitions by the licensees had to do, I think, with preventing licensees from going into the exhibition business. As I recall, the exchanges with which we dealt at that time were fearful that the manufacturers might take up the exhibition business, and I think this condition was designed to prevent the manufacturers from interesting themselves in the theatres.

Q. And did that covenant have some relation to the amount of royalties to be paid ultimately under the patents? A. In the same sense that all the conditions had, that we wanted to impose conditions that would result in the satisfactory development of the business, and as the result of the prosperity which we thought would come to licensees under proper conditions, the Edison Company would receive a larger amount of royalty.

Q. Most of the provisions to which I have particularly called your attention in the Edison license agreements, were subsequently incorporated in the license agreements made by the Motion Picture Patents Company, and its ten so-called manufacturers and importing licensees, which are already in evidence in this case, is that right? A. Yes, sir.

Q. Confining your answer to such of the foregoing provisions as were substantially incorporated in the Motion Picture Patents Company licenses, you may state whether or not the purpose or purposes of including them in the latter licenses were the same as were the case in the licenses issued by the Edison Manufacturing Company, having in mind, however, the fact that the Motion Picture Patents Company, the licensor under this license agreement, was not itself engaged in the motion picture business, that is, producing or manufacturing. A. All the conditions or the reasons for the conditions were the same in the case of the Patents Company as with the former Edison licensees, and all of the reasons which impelled the licensees to protect themselves from unfair treatment on the part of the Edison Company as a competitor, were doubly present in the case of the Patents Company, in view of the fact that the Patents Company was owned by two competitors, namely, the Edison Company and the Biograph Company.

Q. You were President of the Motion Picture Patents

- 1 Company, were you not, from its organization up to about December, 1912? A. I was President from December 18th, 1908, until I resigned in December, 1912.

Q. Then you were President at the time when all of these license agreements were executed in December of 1908? A. I was.

- Q. What was the reason which induced the Patents Company, instead of authorizing the sale of these motion pictures, to restrict it to a lease? A. That was done as a result of our experiences under the Edison licenses. So far as the exchanges were concerned, it made no difference, because under the Edison licenses, there was a conditional sale with the return of the film at the end of six months, while under the Patents Company licenses, there was a lease for the return of the film at the end of seven months; in other words, the Patents Company license in terms of percentage was sixteen and two-thirds per cent. more favorable than the Edison license. The main purpose of providing for a lease instead of a sale was to more effectively prevent infringement. Under the Edison licenses, if a licensed film, in violation of the conditions of the license, was shown by an unlicensed person, it was difficult to enforce the agreement, because, in the first place, it was very difficult to identify the particular copy of the subject, and trace it back to the infringing exchange. There was no way that we could seize it, and it would have been futile to have brought a patent suit against the theatre, because the film was used by the theatre only from one to two or three days. I recall that one of the experiments we tried was to suggest to certain of the manufacturers to put private marks on each copy of a picture, so that they would be able to tell when the picture was thrown on the screen to whom it was sold, and thereby trace it back to the infringing exchange. This was an expensive process, because it meant putting a certain individual mark on each print, and a considerable amount of bookkeeping in keeping track of them, and I do not recall that anything came of this suggestion, but by providing for the lease of the films, which did not affect in one iota the rights of the exchanges or their free use of the film in exactly the same way that they had used them under the Edison licenses, we were able in case of a violation of the license to seize the films by replevin suits, or rather, the individual manufac-

1 turers were able to do that, and a good many of these replevin suits were successfully carried out in the case of the violation of the licenses by infringing theatres. Also another reason that impelled us to change to the lease was that in quite a number of States there are unfavorable laws on the subject of conditional sales, and we felt that we might involve ourselves in difficult problems if we continued the former plan of selling the films conditionally. This change did not in any way prejudice the exchange, and it was of very great help to us in enforcing our legitimate patent rights.

Q. By unfavorable laws in many of the States, do you refer to the laws of States like Pennsylvania, for instance, where a conditional sale of a chattel, that is to say, a sale with a reservation of title in the vendor, is not recognized?

A. Yes. We had run afoul of those laws in handling the Edison business phonograph on the installment plan. I think there were similar laws in the State of Ohio.

Q. Did you find also, that it was difficult to enforce the requirement of the provision in your license as to the return of film after six months, where title had passed? A. Yes. We did not, as I said before, have any of the film returned under the Edison licenses, but—

Q. (interrupting:) You were confronted with that difficulty? A. We were confronted with that difficulty, and a good many exchange men in talking with me, expressed the opinion that, having bought the films, they thought they ought to be allowed to keep them, and not be required to return them. And I think if we had gone on under that arrangement, we would undoubtedly have confronted difficulty with a good many exchange people who did not seem to appreciate what a conditional sale was.

Q. What was the purpose of incorporating in the Motion Picture Patents Company exchange license agreement, the paragraph reserving to the Patents Company the right to cancel the license on fourteen days' notice? A. There were a good many reasons for this. There was no way, or, at least, there did not seem to be any way, to bind the exchanges irrevocably to the Patents Company, and compel them to always remain licensees, and deal in licensed films. They always reserved the right to renounce the license whenever they saw fit to do so.

1 Mr. GROSVENOR: Whom do you mean by "they?"

The Witness: The exchanges.

By Mr. CALDWELL:

Q. You mean that the contract was entirely unilateral in that respect? A. In that respect it was. Then again, in the grant of these licenses, we were not starting out with an infant industry that could be nursed along until it reached the full size of manhood, but were dealing with a large, existing, highly disorganized, complex situation, and we had to move quickly, so as to cause as little disorganization and disturbance as possible. We granted licenses to all the exchanges, so far as I remember they wanted them, without making any particular investigation into their standing or responsibility, and we felt that it was important that the right should be reserved to terminate the license if we found that an exchange was unreliable, or if, for any other reason, it was considered desirable, from the standpoint of the patent, to end the relationship of the licensor and licensee.

3 Q. The exchange did not pay any consideration to the Patents Company for these licenses, did they? A. No, sir. The license was a mere privilege and not a right. Like any license, it was the privilege to be immune from suit during the existence of the license.

Mr. GROSVENOR: I object to all this characterization and opinions given by the witness.

By Mr. CALDWELL:

4 Q. You may narrate the events that led up to the formation of the Patents Company. A. When the Edison licenses were in effect, the business resolved itself into two antagonistic factions, the Edison licensees on the one hand, and the Biograph Company and Mr. Kleine, I think, and I think on one or two Biograph licensees, on the other. Our patent on the camera had been sustained, and our position was therefore pretty strong, and we had the film patent which covered all motion picture films; while, on the other hand, the Biograph Company had patents on which it was asserting its rights, particularly on projecting machines. These were

the Latham patent and the Pross patent, and the Armat-Jenkins patent. We were going ahead with the accounting on the camera patent, and were also pressing the suit on the film patent against the Biograph Company, and against various infringers in the Biograph camp. On their part, they had brought a suit against us on their patents. When I say "us," I mean the Edison Company and its licensees. It looked very much as if all the fighting that if we had been engaged in ever since 1898 or earlier was to start all over again. When the Edison licensees were being granted, I offered the Biograph Company a license, but they refused to take it, and later on I saw Mr. Marvin with Mr. Kennedy, at the suggestion, I think, of Mr. Pathe, or possibly Mr. Gaumont may have made the suggestion—and we discussed the possibility of settling our suits—settling our patent difficulties. Because we both realized that if the suits that were pending should turn out successfully to the patentees, we would simply embargo each other. We would prevent the operation of any successful camera under the camera patent, and we would prevent the sale or the use or any importation of film under the film patent, and they would prevent the use or exhibition of any film, however made, under the patents of the Biograph or Armat companies. Mr. Marvin explained the case from his point of view and pointed out the importance of his patents, how valuable they were, and thought it might be possible to have some scheme under which we would recognize his patents, and he would recognize our patents, with a division of the royalties. I asked him how much royalty he thought the Biograph interests should get, and he said he thought they should get half. I did not think he should get half, because Mr. Edison's patents were then—the camera patent had been sustained, and the licenses granted, and he was getting two hundred and fifty or three hundred thousand dollars a year out of them. I thought his position was rather favored, and very much stronger than the Biograph. Mr. Marvin argued that the Armat patent had been sustained at final hearing before the Judge Hazen, and could be made the basis of preliminary injunction, and the Latham patent had a long time to run, and was valuable for that reason, and he thought that they were entitled to half of the royalties, and I would not agree to that, so we both separated, I insisting upon the value of our patents, and he insisting upon the value of his patents,

- 1 and the fight went on again. Or, rather, the fight still continued, because this brief talk did not stop it at all. Then a little later, at the request of Mr. Kline, I went up to see him at the Republican Club. I had always known him and liked him, and he told me that the constant fighting between the Biograph and Edison companies, with the terrible uncertainty of the result, had put everybody up in the air, and they did not know where they were, and he suggested that if we possibly could, we ought to get together and have some agreement that would result in a termination of all the warfare, and putting the business in a condition of quietude, so that people could go ahead and invest money in their plants, and build better theatres and develop the business. Well, I saw Mr. Marvin and Mr. Kennedy again, I think in company with Mr. Kline, and we went through the same performance that we did at our first meeting, Mr. Marvin making his speech, and I making my speech, and he making his demand for half of the royalties, and I refusing the demand, until it occurred to me that if Mr. Edison could be assured that he would get his film royalties, why, it would be possible then to allow the Biograph Company to take an equivalent amount out of the royalties that might be collected from other sources, and that anything remaining over should then be divided between the two interests, because primarily my purpose was to try to save the money that Mr. Edison was getting under his patents. I did not want to jeopardize that or divide it up with anybody. This suggestion met with the approval of Mr. Marvin and Mr. Kennedy, and then I saw that it was possible to have an arrangement that would bring the two concerns together. We had a talk at that time, and I think we had several other talks about how the thing should be done, and naturally the first suggestion was for them to recognize our patents by taking a license under our patents, and we to recognize their patents by taking a license under the Biograph patents, but this seemed to be a very difficult thing to do, and it would have to be done anyway by means of a combination or arrangement, so as to divide the royalties that were to be collected, and it seemed to us that the only proper way to do was to bring all the patents into one holding corporation to act as a licensor, and that would provide the various ways of collecting the royalties, and that would collect the royalties, and that

would divide the royalties between the several patent owners, on the basis that we had agreed upon, and that company was later formed and was called the Motion Picture Patents Company.

Mr. CALDWELL: It is now half-past four, our usual time of adjournment, and I suggest that we adjourn until tomorrow, at the usual hour.

The Examiner: The hearing is adjourned until 10:30 o'clock tomorrow morning.

Whereupon, at 4:30 P. M. on this 10th day of November, 1913, the hearings are adjourned until Tuesday, the 11th day of November, 1913, at 10:30 A. M., at the Hotel Manhattan, New York City.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA,	} No. 888. Sept. Sess. 1912.	1
Petitioner,		
v.		
MOTION PICTURE PATENTS CO. and others,	} Defendants.	2
Defendants.		

New York City, November 11, 1913.

The hearing was resumed pursuant to adjournment at 10:30 o'clock A. M., November 11, 1913, at Room 159, Manhattan Hotel, New York City.

Present on behalf of the Petitioner, Hon. EDWIN F. GROSVENOR, Special Assistant to the Attorney General. 3

J. E. DARLING, Esq., Special Agent.

Present also, Messrs. CHARLES F. KINGSLEY, GEORGE E. WILLIS and FRED R. WILLIAMS, appearing for Motion Picture Patents Company, Biograph Company, Jeremiah J. Kennedy, Harry N. Marvin and Armat Moving Picture Company. 4

Mr. HENRY MEVILL, attorney for George Kleine, Essanay Film Manufacturing Company, Selig Polyscope, George K. Spoor and W. N. Selig. 4

Mr. JAMES J. ALLAN, appearing for Vitaphone Company of America, and Albert E. Smith.

J. H. CALDWELL, appearing for William Pelzer, General Film Company, Thomas A. Edison, Inc., Kalem Company, Inc., Pathe Freres, Frank L. Dyer, Samuel Long and J. A. Berst.

1 Thereupon FRANK L. DYER resumed the stand.

Direct examination continued by Mr. CALDWELL:

Q. Mr. Dyer, in answer to my last question yesterday, in speaking of your conference with Mr. Marvin, you stated that Mr. Edison was getting from two hundred and fifty to three hundred thousand dollars a year out of licenses. Did you mean by that he was getting that sum from his royalties alone under his patents, or altogether including his profits from his producing plant? A. That is what I figured the royalties would amount to.

2 Q. After the formation of the Patents Company, to what persons were licenses issued, first, licenses to produce and to import? A. Licenses were granted to the seven Edison licensees, and also to the Edison Company, Biograph Company, and to George Kleine.

3 Q. Did these persons constitute substantially all of the persons engaged in the production and importation of motion pictures at that time? A. I should say a very considerable portion.

4 Q. Those who were not licensed, were they of any importance in the art? A. No, sir.

5 Q. So substantially the entire art was licensed? A. Substantially so.

6 Q. And to what other classes of persons were licenses issued? A. Licenses were also issued to the manufacturers of projecting machines, and also to exchange men who were doing a distributing business, and finally to theatres who might wish to show licensed film.

7 Q. I think it is in evidence that about ninety-five per cent. of the manufacturers of projecting machines were licensed. Does that accord with your recollection? A. I think fully that. I know that all of the important manufacturers were licensed. And I might add that licenses were granted to other concerns who started up in business for the manufacturing of projecting machines after the Patents Company was formed.

8 Q. What was the policy of the Patents Company, in the issuance of licenses to exchanges? A. To grant a license to any fairly representative exchange which might wish to be licensed. I do not recall that any license was refused

to an exchange at the time that the Patents Company was started.

9 Q. Can you state why the license agreement, or the license to George Kleine, restricted his importations to the makes of certain European producers? A. At that time, as I stated yesterday, the Pathe Company towered head and shoulders above the other producers, and especially in Europe, and next to them, although considerably smaller, was the Gaumont Company, and below the Gaumont Company was a large number of small producers. Mr. Kleine had agency contracts for a great number of brands of films, most of which we never heard of. We felt that it would be a mistake to allow these unimportant foreign made films to enter into the programmes of the American manufacturers, because we were fearful that it would not add prestige to it. The Gaumont films, and the Urban Eclipse films were good representative foreign films, and the best of the films Mr. Kleine was importing, and we felt that these films could properly be introduced into the programmes. Mr. Kleine was, therefore, allowed the importation of three subjects per week, of these two films, but, of course, he was not restricted as to the number of copies that he could import, and dispose of. This gave the licensed output of foreign films—as Pathe, Gaumont, Urban Eclipse, and Melies. My recollection is that most all, or at least many of the films that were formerly handled by Mr. Kleine were, when he terminated his agency for them, imported into this country by other concerns. So that their importation into this country was not stopped, although they were not licensed.

10 Q. So far as you know, did Mr. Kleine protest against being restricted to importation of these two brands of films? A. No. Those two brands were practically his entire business.

11 Q. Were many of the other films imported by Mr. Kleine of a character to reflect credit upon the art? A. No, they were poorly and cheaply made and many of them, as I recall, were not the kind that would appeal to the American people. As a matter of fact, foreign films, I do not think, at any time appealed very strongly to Americans, because the foreign idea of morals is different from the American idea; but a large mass of foreign films was used in the early days, because those were all that the Ameri-

1 can had, except the limited number of American films that were being gradually developed.

Q. In refusing, then, to license these cheap films, many of which were not up to the American standard of morals, was the Patents Company actuated by any purpose or desire to improve the condition of the art, and thereby increase the revenues which they might ultimately receive under their patents? A. Yes, sir.

Q. Mr. Dyer, will you state just what the motion picture business is, as it is conducted in this country today? A. The motion picture business at the present time is practically a theatrical business, because it deals, for the most part, with dramatic works. It makes the same appeal to the imagination that is made by the drama. It is a new form of intellectual appeal. It depends for its successful accomplishment, first, upon an optical defect of the eye, known as the persistence of vision, and it depends, in the second place, upon the human faculty of forming mental images when the imagination is aroused, as with literature, paintings, music, or the drama. A moving picture audience is like any other audience, sitting spellbound and unconscious of its surroundings. Like the regular stage, the spectator of a moving picture, experiences the feelings and sensations of the characters which appear on the screen. These photographic images are just as real to the moving picture spectator as are the living, breathing, actors and actresses of the regular stage. The popular motion picture actresses are just as much overwhelmed by letters from admirers as the most popular actresses of the regular stage, although they are known to the people only by reason of their photographic representations.

4 Mr. GRAYSON: That is highly interesting, but I fail to see how it is relevant or material, and, therefore, we make objection to it.

Mr. CALDWELL: I think it very material to show to the Court the real nature of the business conducted by these defendants, which they are charged with restraining and monopolizing.

The Examiner: Proceed, Mr. Witness.

A. (continuing): The motion picture business, like the theatrical business, falls naturally into three groups—

1 first, the producer; second, the distributor, and third, the exhibitor. In the production of a motion picture drama, the play is selected and prepared, in precisely the same way as if for the regular stage, except, of course, with the regular drama, the playwright provides the spoken words; but in the case of pantomime there is really no difference in the original play, except that the motion picture, because of its greater flexibility, and greater possibilities, permits of many more scenes, and the securing of effects that would not even be suggested in the case of a pantomime. Having prepared the play, it is turned over to a director, exactly as is the case with the regular drama, and that director gathers around him in one case, as in the other, the body of actors selected to perform the respective parts. In each case costumes are provided, proper scenery is painted, and the necessary properties secured. The director rehearses the actors so that they may become perfect in their parts, exactly as the director of a regular stage conducts his rehearsals; and when perfection is reached, the motion picture camera is brought out, and the finished performance given before the camera, and a photographic negative record taken of that performance. In other words, so far as the production is concerned, the motion picture art is the same as the regular dramatic art, except that instead of utilizing the body of actors collected by the director to go out on the road and give their performances before the various audiences, the director in the case of the motion picture play sees that a photographic record of the drama is made, and copies of this record are sent out on the road, and are exhibited in the several theatres. The second class, or group, connected with the motion picture business, namely, the distributor, has its analogy in the regular theatrical business in the booking office, or in the booking agency, and in the motion picture business this distributor is called an exchange. The purpose of the exchange is to distribute the plays among the motion picture theatres. Because of the brevity of the motion picture, a programme usually comprises three or more plays, and these programmes are changed from one to seven times weekly. With the more important pictures, which are a recent development, and which seem to be destined to greater use in the future, pictures of the same general type as Quo Vadis—the booking

- 1 is precisely the same as the booking of a regular dramatic performance, dates being arranged in advance, and advertised by the theatres exactly as they might advertise a regular road show. The only difference between a distributor, or exchange, in the motion picture business, and the booking office, or the booking agency, in the theatrical business, is that in one case the distributor deals with the photographic record of the play, while the booking agency in the theatrical business, deals with living, breathing actors, and the tangible accessories of the performance, such as scenery, costumes and properties, including in the latter sometimes, various animals. The difference between the moving picture business in this respect, and the theatrical business, is that the transportation of a theatrical company may require one or two cars, while the moving picture requires a package smaller than a dress suit case. So far as the third group is concerned, namely, the theatres, one is practically the same as the other. In fact, it is very common for motion pictures to be shown in regular theatres, and it is getting to be more and more common for small plays, and vaudeville acts, to be shown in connection with motion pictures in picture houses. In fact, in one State that I know of, Massachusetts, the law prohibits continuous exhibitions of pictures for more than twenty minutes at a time, so that it is necessary to fill in with vaudeville, or small plays.

The only difference between a motion picture theatre and a regular theatre is that while a regular theatre has a horizontal stage, upon which the actors perform, a motion picture theatre makes use of a vertical screen, upon which the photographic representations of the actors are projected; and also, a motion picture theatre is generally smaller than a regular theatre, and more economically run, and the price of admissions is almost invariably lower.

Mr. GROSVENOR: Everybody knows all these facts, and I object to littering up the record with all of this talk.

Mr. CALDWELL: The record does not, up to date, disclose these facts.

Mr. GROSVENOR: Everybody knows that the ad-

mission to motion picture theatres is less than to other theatres. 1

Mr. CALDWELL: But these are not necessarily matters of which the Court would take judicial notice—we have got to prove them.

The Witness: Mr. Grosvenor might stipulate.

Mr. CALDWELL: Go ahead, Mr. Dyer.

The Witness: I don't think I can add anything to that. 2

By Mr. CALDWELL:

Q. Then, in point of fact, the only thing which differentiates the picture play from the regular theatrical play is that the latter is presented by living actors, and by word of mouth, and the former by photographic images of these same actors? A. That is correct, and apparently the effect on the audience is the same in the one case as in the other. In the case of the motion picture it seems to be a very remarkable fact that the imagination of the audience re-creates the photographic images, and turns them into life. Not only this, but the imagination also supplies the perspective to the fleeting images, and also supplies color to the black and white photographs. The incongruity of a black and white rose never seems to appeal to a moving picture audience.

Q. The various mechanical devices involved in the production of the motion picture play are not apparent at all to the audience, are they? A. You mean the cameras used?

Q. Yes, the cameras, projecting machines, and any other mechanical devices used in the production of the play? A. No, sir. The only thing that the audience sees is the photographic images on the screen, apparently in movement.

Q. The film itself is not seen? A. No, sir.

Q. Will you state what classes of persons are engaged in the production of the motion picture play? A. The director who—

Q. (interrupting): Isn't there a class of persons who

1 have something to do with the business or contribute to the business, that precedes even the director? A. Yes. First I should take the scenario writer, who prepares the necessary play or drama; then the director, who attends to the rehearsing of the actors; then the actors who appear in the play; scene painters who prepare the scenario; carpenters who make the necessary properties; people who have charge of the costumes and wigs; and finally, the camera man, who actually operates the camera to take the picture; with the usual accessories of electricians and mechanics generally found around a studio or in a regular theatre.

2 Q. What class of persons in the motion picture business are employed in your second class that you have described, which you have stated is analogous to the booking office or booking agency? A. These are the exchanges. Offices that are located at centers of distribution, in charge of a manager who is familiar with the business, with a stock of films that is constantly mobile, inspectors and repairers, who are attending to the inspection and cleaning and repairing of the film, booking men, who attend to the booking of the programs to the several customers, and the usual office employees, who attend to the general work.

3 Q. While it is usual for the producer of motion pictures to have a so-called manufacturing plant as part of his equipment, is that always a necessity? A. No, the manufacturing operations are quite independent of and distinct from the purely artistic work of producing the plays. Just as the mechanical work of a regular theatrical performance is independent of the artistic part. It is quite the common thing in this country for studios where the artistic work is done, to be located sometimes as far as
4 three thousand miles away from the manufacturing plant where the purely manufacturing operations are performed. And in Europe, it is quite common for companies to go no further than to attend to the artistic work of producing the negative, leaving the manufacturing operations to some manufacturer. The Pathé Company, in Paris, for instance, do the printing for quite a considerable number of the producers, and I believe this will be the eventual development, or one of the developments, possibly, in this country. I think even now there are some concerns in America who

1 have no manufacturing plants, but who merely make the negatives.

Q. Take the case of the Edison Company. Will you state where its studio is located, and where its so-called factory is located? A. The main studio of the Edison Company is at Heford Park, Bronx, New York, and the factory where the printing operations are performed, is at Orange, New Jersey, about twenty miles away. The Edison Company also maintain a studio, or did, while was connected with them, at Los Angeles, California.

2 Q. Can you state the locations of the studio and the manufacturing plant in the case of any of the other producers? A. Yes. In the case of the Biograph Company, the factory and main studios are located in New York City, but they also maintain a studio at Los Angeles. In the case of the Lubin Company, the factory and one studio are located in Philadelphia, but they maintain very large studios at Betzwood, about thirty miles outside of Philadelphia, and studios also in Jacksonville and Los Angeles. The Selig plant is in Chicago, where its main studio is also located, but the Selig Company maintains a large studio at Los Angeles. And the same is true of the Essanay Company, which has recently started the production of negatives, I think, at Watkins Glen, New York. The Pathe Company have their manufacturing plant at Round Brook, and their American studio at Holoken, while their main studios are in Paris.

3 Q. Can you state why so many of the studios are located in Los Angeles, California? A. On account of the generally fine weather there, and the great variety of natural scenery, just the same as many of the studios of French producers are located on the Mediterranean.

4 Q. What has the fine weather to do with the work of a studio? A. Because a great deal of work has to be done outside of a studio, for getting outside scenes, and it is important that there should be as little waste of time as possible, because waste is very expensive in the production of pictures, and it is important to keep the actors employed as actively as possible. Good sunlight is also important to secure proper photographic quality.

Q. Then would you say that the term "manufacture," as applied to the producer of motion pictures, was a misnomer in a sense? Does it correctly describe the occupation? A.

- 1 No. I do not think it does. I think the same relation exists between the producer and a manufacturer, if we attempt to separate them, that exists between the producers of the Century Magazine, who do the literary work and get up the magazine, and the De Vinne Press, that prints the copies of the magazine.

Q. What percentage of motion pictures exhibited in this country would you say are of a purely theatrical character, that is to say, either drama, comedy or farce? A. The number varies from week to week, but I think the average would be from 85 to 95 per cent.

- 2 Q. And the rest of the pictures are made up of so-called scientific, educational, scenic and topical subjects, is that correct? A. Yes, sir.

Q. What is meant by a scientific picture? A. A scientific picture is one that illustrates some scientific phenomenon, such as the flight of a bullet, or views of the moon, or a chemical reaction, all of which have been shown in motion pictures.

Q. What is an educational picture? A. It is not very easy to—

- 3 Q. (Interrupting): Can you, strictly speaking, differentiate between a scientific picture and an educational picture? A. Yes. I think an educational picture would be correctly defined as one that possessed educational value without the scientific attributes. For instance, a picture illustrating the raising of sheep, or the iron industry, or the tobacco industry, or the sugar industry, all of which have been shown in motion pictures. It is getting to be quite a common thing to disguise educational pictures by a dramatic story, so as to make them more attractive. For instance, the Edison Company made a very well-known picture called "The Man Who

- 4 Learned," which was designed to point out the dangers of unsanitary conditions in connection with the supply of milk, but the moral was taught in a story of great dramatic interest. And we also made another picture called "The Welding Bell," that was a strong dramatic story, but was essentially an educational picture, because its object was to point out the evils of sweatshop labor.

Q. What is a scenic picture? A. A scenic picture is one that contains simply scenery, or possibly views taken in a city, showing important buildings or streets. For instance, a picture of the Alps would be a scenic picture, and one show-

ing a panorama of Broadway, New York, would also be a scenic picture.

Q. And what is a topical picture? A. A topical picture is one that depicts a subject of topical interest, such as a championship baseball game, or prize fight, or the inauguration of a President, or a subject of this general character.

Q. What do the so-called dramatic pictures, as the term is used in the motion picture business, include? A. I do not think the term dramatic picture is used, but we refer to dramas, by which we mean a story of dramatic interest, devoid of comedy or farcical features.

Q. Then the term "drama," as used in this art, would include tragedy and melodrama? A. No. We sometimes use the term "melodrama" to mean a drama with tragic features, but ordinarily the word "drama" includes everything of a dramatic nature, except comedies.

Q. Then are the terms used in the same sense that they are used in the theatrical profession? A. Yes. In exactly the same sense.

Q. What are the considerations which enter into the selection of a play to be produced on the motion picture stage? A. Strength of plot, timeliness of the subject, interest of the story, the moral sought to be taught, are all factors that are considered in the selection of a motion picture play.

Q. They are precisely the same, then, as in the regular theatrical business? A. Yes, sir, exactly. The motion picture business, as I pointed out, is practically a theatrical business.

Q. What means, if any, are resorted to by the producer of a play or the exhibitor, in order to supply the omission of the spoken word? A. The fact that with the motion picture play, there is no dialogue except, of course, in the case of the talking pictures which are a recent development, it makes it impossible with a motion picture play to get the very fine shadings of emotion that are possible with the spoken word, so that the motion picture play is perhaps not as complex as the regular spoken play, but there are several ways to supply the deficiency of the spoken word with the motion picture play, by which its effectiveness is very much increased. For instance, the actors, as is well known, generally in rehearsing, make use of words, and very frequently these words can be distilling

1 wished on the screen, particularly when they are single words, such as "mother" or "help." Then, the director has the advantage, which is not possible with the regular spoken drama, of throwing subtitles on the screen, that is to say, words or phrases or sentences that are designed to explain the significance of the scene which is to follow. A sub-title is used when the director fears that the proper motion picture play, it is very common to throw on the screen, letters and telegrams and documents which the audience can read, for the purpose of making the plot clear, and which, on the regular stage, are read by one of the characters as a part of the dialogue. Then, a very effective way of supplying the deficiency of the spoken word, is by so-called double exposure, where, on the main picture appears a small auxiliary picture designed to explain the action of the main picture. For instance, in a regular spoken play, if one of the characters wished the audience to know that at one time he had been a cowboy on the western plains and had taken part in a certain incident, he would tell his story as part of the dialogue. In the motion picture play, we actually throw on the screen as an auxiliary to the main picture, scenes showing the character as a cowboy on the western plains, and enacting the same incident that he would describe by words in the regular play. These various expedients have been developed in the art, and permit motion picture plays of fairly complex character which are perfectly intelligible to the audience.

Q. Then the double exposure is a device which makes possible dramatic representations on the motion picture stage which is impossible on the legitimate stage, is that correct? A. The double exposure, of course, on the regular stage would be impossible, but the same effect is secured on the regular stage by means of the spoken word.

Q. But the dramatic action is wanting? A. The dramatic action is wanting, of course.

Q. You have mentioned the play called "Quo Vadis." Have you ever seen that play? A. Yes, sir.

Mr. GROSVENOR: May I interrupt? Who brought out Quo Vadis?

The Witness: The Cines Company at Milan.

Mr. GROSVENOR: That is a foreign company, isn't it?

The Witness: Yes.

Mr. GROSVENOR: I object to any examination about Quo Vadis.

By Mr. CALDWELL:

Q. Was Quo Vadis a picture imported by one of the so-called licensed importers of the Motion Picture Patents Company? A. Yes, sir, it was imported by Mr. Kleno.

Q. And that picture is licensed by the patents owned by the Motion Picture Patents Company, is it not? A. Yes, sir.

Mr. CALDWELL: I think that answers your objection, doesn't it, Mr. Grosvenor?

Mr. GROSVENOR: No, I make the objection that it is entirely immaterial.

By Mr. CALDWELL:

Q. There is a scene in that picture that takes place in the Roman amphitheatre, is there not? A. Yes, sir.

Q. Could you describe that scene briefly? A. Yes. The scene shows the representation of the Roman amphitheatre with Nero and his attendants in the seats of honor, and a good many thousand spectators depicted as the audience, and the turning of the lions into the amphitheatre to devour the Christian martyrs.

Q. Are all of these spectators in motion? A. They are the photograph of real people.

Q. In motion? A. In motion.

Q. Would such a scene as that be possible on the regular dramatic stage? A. No, sir.

Q. Why not? A. Because of the limitations of the stage, it would be impossible to anywhere near approximate the size and grandeur of the settings. On the regular stage, the audience in the amphitheatre would be confined pro-

1 bly to fifty to a hundred people. In the motion pictures, I think there were at least three thousand in the audience, and possibly five.

Q. On the regular stage, the spectators would be represented, would they not, by painted images on the scenery? A. They might be. Or they might be real people gathered on the stage.

Q. There is another scene in that play which depicts the burning of Rome, is there not? A. Yes. There are several scenes showing the burning of Rome.

2 Q. Could that scene be possible of reproduction on the regular dramatic stage? A. Not to the same extent. Not with the same vividness nor could it cover the same area. The regular stage is necessarily circumscribed by reason of its limited size.

Q. From what sources do the producers of motion picture plays obtain their plays? A. Generally, the plays are prepared by a new type of literary artist, who has developed with the art, called the scenario writer. Sometimes these scenario writers are regular dramatists. For instance, the present Congressman, E. W. Townsend, of my home town, was a scenario writer for the Edison Company, and was also a dramatic writer and novelist. These scenario writers base their plays on original plots, and sometimes they base them on other sources of literary work, such as standard works of fiction. The Bible is a very potent source of inspiration for motion picture plays. Most of the biblical scenes have been enacted as parts of motion picture dramas. Most of the works of Dickens and Thackeray have been converted into motion picture plays. Many of the plays of Shakespeare have been used, and other standard dramas. Poetry is also a source of inspiration.

4 The Lady of the Lake has been given. Such an apparently impossible subject as Pippa Passes, by Browning, was made into a very beautiful motion picture play by the Biograph Company. By means of the motion picture, any work of fiction, or of the drama, can be presented graphically and vividly to the audience for five cents.

Q. Does it happen with more or less frequency that the authors of plays, playwrights, who write for the regular dramatic stage, also write motion picture plays? A. Many dramatic authors write motion picture plays. For instance, I have mentioned the case of Congressman Townsend. And

I know that Mr. Augustus Thomas is now working on motion picture plays, and also Charles Klein.

Q. Does it often happen that a well-known work of fiction is dramatized for the motion picture stage, just as it is on the regular dramatic stage? A. Oh, yes. That is another source of inspiration. For instance, the Famous Players Company are just putting out a play called, "In the Bishop's Carriage," which first appeared as a novel. And also, "Soldiers of Fortune," by Richard Harding Davis, is now being made into a motion picture play, and this first appeared as a novel.

Q. Do you happen to know whether "Ben Hur" and "The Last Days of Pompeii," have also been dramatized for the motion picture stage? A. Yes. Both of these works have been made into motion picture plays.

Q. Would you say that that is typical of what has been done, and what is being done every day in the motion picture art? A. Yes. The motion picture art is bringing these fine, standard, elevating works, to the attention of millions of people of the United States, who possibly otherwise would know nothing whatever about them.

Q. Does it often happen that a regular dramatic production which has appeared upon the so-called legitimate stage, has also been enacted before the motion picture camera, and reproduced on the motion picture stage? A. Yes, that also has been, and is being, done.

Q. Is any knowledge of stagecraft, as applied to the legitimate stage, requisite for the motion picture production after the play has been selected? A. Absolutely. The motion picture director has to be just as skilful in staging up and properly placing a dramatic situation, as on the regular stage. He has to also keep in mind at all times, the limitations of the field of the camera, and must keep his actors at the proper distance away from the camera. And he also has to be familiar with the conditions of light, so as to secure the proper photographic effect. But in a dramatic sense, his work is identical with the work of the ordinary stage director.

Q. And the ultimate object is to produce the same effect upon the motion picture audience as is produced in a regular theatre? A. That is the real object.

Q. To what extent do the producers of motion pictures have stock companies of actors and actresses in their em-

1 ploy? A. All the licensed producers, as far as I know,
employ from one to ten regular stock companies for the
purpose of making the motion picture plays.

Q. And the same thing is true of the unlicensed producers, is it not? A. As far as I know, it is.

Q. From what class of persons are these stock companies recruited? A. In a large measure from actors from the regular stage. There is a constant shifting back and forth of actors from the regular stage to the motion picture stage, and vice versa, and constant shifting of actors from one motion picture company to another, in fact, the motion picture work is looked upon by the actors as simply one of the opportunities for employment.

Q. Is it quite common for stars in the theatrical world to accept engagements on the motion picture stage? A. Yes. This is getting to be quite common. Sarah Bernhardt, James K. Hackett, Mrs. Fiske, Charles Hawtree, are all well known stars, and they have appeared in motion pictures.

Q. Will you describe a motion picture studio and its equipment? A. Motion picture studios are of three classes. First, the outdoor studio; second, the daylight studio; and third, the so-called dark studio. With an outdoor studio, there is simply a platform out of the sunlight with the stage sets, properties, and scenery, and the action takes place out of doors, the photographing being done by sunlight. These studios, of course, are used only in good weather, and for a limited number of hours each day. They are more common in places like Jacksonville and Los Angeles, where the climatic conditions are favorable. The daylight studio is a large building, somewhat like an immense conservatory, with an extensive stage, and a glass roof, and ordinarily, glass sides. Generally, daylight studios are equipped with powerful arc lights for the purpose of supplementing the sunlight in overcast weather, or for working at night, or for accentuating certain lighting effects which would be impossible for sunlight. For instance, the glare from a fireplace. These daylight studios are provided with screens made of thin cloth to be pulled over the glass top for the purpose of diffusing the light, exactly as in an ordinary portrait studio. The third class, or dark studio, is very similar to the daylight studio, except that it is a large closed room lighted entirely by artificial means.

A modern studio is equipped with a scene-painting department for the manufacture of scenery, and a large property room is also provided, in which a multitude of the commoner properties are kept, also costume room, carpenter shop, and other necessary accessories.

Q. Dressing rooms for the actors and actresses? A. Dressing rooms for the actors and actresses, and rooms in which the directors work, and so forth. I have had in mind in answering your question, particularly the Edison daylight studio, but I have visited the studios of most of the licensed manufacturers, and the same description applies substantially to all of them. Sometimes the daylight studio will be combined with a dark studio in a building of several floors, the upper floor being enclosed in glass so as to comprise the daylight studio.

Q. After the motion picture play has been selected, what is done in the way of providing costumes and scenery, and properties, and so forth? A. Ordinarily the director who is assigned to put on the play, after having studied the play very carefully so as to thoroughly understand it, provides that the proper scenes shall be painted, giving the directions to the scene-painting department, and also provides for the necessary costumes and properties. He generally explains the plays to the actors who may have been selected to perform the parts and explains to them what characters they are to take, and how they are to be made up. The makeup of a motion picture actor is the same substantially as on the regular stage, except that the makeup is somewhat accentuated, and also regard has to be taken to the proper photographic quality of certain colors. For instance, photographically, blue shows almost white, and red is almost black, so that a great deal of rouge which might be used on the regular stage, would be avoided in the moving picture art, as it would appear black.

Q. It is customary to rehearse the actors and actresses in their parts before the camera is brought into play? A. Oh, yes. The rehearsal is very carefully done, because upon that depends the whole success of the final performance. The rehearsal of a motion picture play is relatively as carefully done as on the regular stage. It takes sometimes all day to get the actors properly rehearsed to take a scene. And in the case of some scenes involving a

1 great many actors, it may take several days to rehearse the scene.

Q. During this rehearsal, do the actors speak their respective parts, or is the action entirely pantomimed? A. A certain amount of talking is done, principally for the purpose of making strong scenes more convincing. The actors do not have long involved dialogues the same as on the regular stage, but they generally are talking—generally are saying something along the lines of the actions that they are trying to portray.

2 Q. In some of the motion picture dramas, is any dialogue written for the performers by the author, or is the scenario entirely descriptive of the dramatic action? A. It is quite a common thing for scenario writers, in order to emphasize the strength of certain scenes, to prepare simple dialogues for the characters to speak, although this is not always the case.

3 Q. Then the motion picture camera is not brought into play until after the company has been rehearsed, and their rehearsal is satisfactory to the stage manager or director, is that correct? A. That is correct. I might say that the motion picture camera is the first observer of the finished performance.

Q. And up to that point, no mechanical appliances have been introduced whatever, have they? A. Except such as might appear as mechanical properties; but nothing has been introduced in a mechanical sense that differentiates the motion picture play up to that point from the regular dramatic performance.

4 Q. If in the development of the negative motion picture, any defects are found, either of acting or photography, what happens? A. The scene is taken over again, the actors being again required to enact the scene, and a new photograph being taken of it.

Q. That involves considerable loss and expense, does it not? A. That involves a very great loss, because, although the loss of film may not be very much, yet the loss in time of the actors amounts to a great deal.

Q. Is it ever the practice to have more than one camera turned upon the scene of action at the same time? A. Yes. It is generally the practice to have about two cameras. This was done in the case of the Edison Company for the

purpose of providing a negative which could be sent abroad, because our foreign business was the sale of copies of pictures made in Paris. By having two cameras, the producer can select the better picture. The two pictures would differ, because they are taken from different points of view, and one is better than the other. In the case of a very expensive scene, for instance, the collision of two locomotives, where, in case of some trouble, it would be impossible to have a second performance, the producers may have as many as ten cameras on the scene so as to be sure that the picture is secured. You understand that sometimes these cameras fail to work, and after the scene has been patiently acted, the director finds that not a foot has been taken.

Q. And in the taking of a picture representing some topical event of unusual interest, such as the inauguration of a President, which you have mentioned a while ago, more than one camera would be brought into play there, would it not? A. Yes. It would be difficult to get a President to give a second performance in the case of failure.

3 Q. Explain what is done with the negative. A. The negative is developed and dried, just like any ordinary kodak negative, except that its great length has to be taken care of. For this reason, it is generally wound on a big drum, or around a rack about the size of a clothes horse, and in that condition, it is developed and dried. From this negative, positive prints are secured in exactly the same way as making a transparency, except that the transparency is on a celluloid strip, and not on a glass plate. And of course, the printing has to be done mechanically, owing to the enormous number of pictures that have to be printed, so that they are run through a printing machine that is very similar to a projecting machine, except that it runs much more slowly, and after the printing of positives, they are developed and dried like any other photographic transparency.

4 Q. Have you stated yet what is meant by subtitles, in connection with the exhibition of picture dramas? A. A subtitle is one of the means used to state the place of the spoken word, and is a word, or phrase, or sentence, or a short description, that is thrown on the screen, either in advance of the whole picture, so as to give the audience some idea of what is going to happen, or else, in the case of some particular scene that may be rather obscure, to

1 advise the audience what the scene is designed to show. Sometimes, also, a sub-title is used to supply a hiatus in the performance, for instance, the word "Later," or "Twenty years after," or something of that sort is used, so as to prepare the audience for the scenes that are to follow, and not confuse them.

Q. Is there any limit to the number of scenes which may be utilized in a motion picture drama? A. Practically not.

2 Q. Is it customary for the producer to give a private exhibition of the drama for criticism, before it is leased or placed on lease, or placed on sale? A. That is invariably the case. The director or producer, of course, would not think of putting out a play unless it had been very carefully inspected, so as to be sure that it was of the proper standard. And these preliminary inspections are also done for the purpose of eliminating superfluous scenes. It is almost always the case with a thousand-foot picture, that the negative may be from 110 feet in length up to possibly 2,000 feet, and it is necessary to cut this down to a thousand feet, so as to make a complete reel, so that the picture is gone over quite a number of times in order to get it in the best final form.

3 Q. Do you see any analogy between the distribution of these motion picture plays and the sending out of one or more road companies from town to town, to produce a regular dramatic play? A. Yes. It seems to me that the two are strictly analogous. With each, arrangements are made with the theatres for definite performances, and dates; and with each, the company in the case of the theatrical troupe, or the films in the case of a motion picture play, are distributed and sent to the exhibitor so as to fill the booking dates. Ordinarily, with the motion picture play, owing to its fragile nature, it is sent back to the exchange distributor after being shown, so that it can be inspected and repaired and kept clean, but in certain territories, speaking for the General Film Company, it is the custom to send motion picture plays out on a circuit from theatre to theatre, so that they may pass through eight or ten theatres in succession, before coming back to the exchange, and such a practice would be identical with the practice of booking a road show from theatre to theatre. With the case of special feature pictures, which

seen to be a recent development, it is the practice to book them for definite dates, and those dates are filled by the booker in exactly the same way as with the regular theatrical business, and the motion picture play is advertised by the theatre in advance, in exactly the same way as the regular road show is advertised.

Mr. CALDWELL: Mr. Examiner, it is now 12:30, and I suggest that we adjourn until 2:30.

The Examiner: Very well.

Whereupon, at 12:30 P. M., the hearing is adjourned until 2:30 P. M., at the same place.

NEW YORK CITY, November 11, 1913.

The hearing was resumed pursuant to adjournment at 2:30 o'clock P. M., November 11, 1913, at Room 159, Manhattan Hotel, New York City.

The appearances were the same as at the morning session.

Thereupon FRANK L. DYER resumed the stand.

Direct examination continued by Mr. CALDWELL:

Q. Mr. Dyer, on what does the value of a motion picture depend? A. That is a rather difficult question to answer, because so many factors enter into the value of the picture. Sometimes the picture is interesting, and therefore, valuable in one section of the country, and is not popular at all in another section of the country. In fact, some of our most popular pictures in some sections can hardly be shown in other sections of the country, but, in a general way, the value of a picture depends upon the interest of the story, the moral that the story teaches, the skill with which the story is told, the clearness, or obviousness of the story, the quality of the acting, the popularity of the actors, or, at least, the star in the play, the quality of the photography, and the steadiness of the picture, are all factors determining its value.

- 1 Q. Does the skill of the acting, or personality of the actor, have anything to do with it? A. Yes, some actors are very popular, although the most popular actors may not be the most skillful. The popular actors seem to have the indefinable quality of taking a good photograph, and making appeals by reason of their inherent magnetism.

Q. Does it frequently happen that the cost of a production is so great that the producer cannot sell it with profit on a footage basis merely? A. That is true, and with the recent development of the art it is getting more true than it was formerly. Pictures are very much more expensive to make now than they were in past years.

2 Q. What would you say as to the maximum cost of a production beyond which the manufacturer or producer could not afford to sell, on a footage basis? A. Based upon present conditions, and having in mind my experiences with the Edison Company, I should say that a picture that cost two dollars per negative foot could be handled with profit, and one that cost two dollars and fifty cents per negative foot would involve a loss. I think the critical point lies between these two extremes.

3 Q. Mr. Dyer, what are the methods now in vogue in the General Film Company in distributing motion pictures handled by it to the exhibiting theatres? I mean now with reference to pictures which are not leased upon a footage basis? A. You mean the General Film Company, or the subjects handled by the General Film Company, or handled by all?

4 Q. The General Film Company? A. The only picture that I recall, that the General Film Company is handling at the present time, not on a footage basis, is the picture entitled, "From the Manger to the Cross."

Q. I did not mean to confine my question in point of time to what was going on today, but what has been its practice with respect to pictures of this class? A. I will ask the Examiner to please read me the last three or four questions.

The following questions and answers were read to the witness:

"Q. Mr. Dyer, what are the methods now in vogue in the General Film Company in distributing motion pictures handled by it to the exhibiting the-

atres? I mean now with reference to pictures which are not leased upon a footage basis? A. You mean the General Film Company, or the subjects handled by the General Film Company, or handled by all?

"Q. The General Film Company? A. The only picture that I recall that the General Film Company is handling at the present time, not on a footage basis, is the picture entitled, "From the Manger to the Cross."

"Q. I did not mean to confine my question in point of time to what was going on today, but what has been its practice with respect to pictures of this class?"

A. (continuing): All the pictures that I recall that have been handled by the General Film Company have been on a footage basis, except that for a short period, a year or more ago, it acquired certain multiple reel subjects, by paying the negative cost of the manufacturers, and I know in one or two instances extra payments to the manufacturers have been made above and above the footage price. The further exception is "From the Manger to the Cross," which we handled for the Kalem Company, and sold out the various State rights for most of the States.

Q. These were all cases involving great negative cost, were they not? A. Yes, sir.

Q. Do you know what the negative cost of the picture which you have just mentioned, "From the Manger to the Cross," was? A. It was a very expensive picture, made in Palestine, and it involved the transporting of a theatrical company from New York, to Palestine, and return, with some properties. I have been told that the picture cost twenty-five thousand dollars, and I have no reason to doubt the correctness of this statement.

Q. You mean that the taking of the negative cost that amount of money? A. Yes, sir.

Q. Was the picture entitled "Quo Vadis," handled by the General Film Company? A. No, sir, it was handled by Mr. Kleine personally.

Q. Well, in the case of an ordinary motion picture which is sold or leased upon a footage basis, what is it that determines the income that the producer may receive from such pictures? A. The number of prints he may be able

- 1 to sell, multiplied by the number of feet, multiplied by the cost per foot.

Q. What do you mean by the expression, "negative cost?" A. The negative cost is the cost of making the negative. That is to say, the cost of the negative film, cost of the actors directly employed in the play, the proportion of the actors' salaries chargeable to the particular play, salary of the director and camera man, cost of scenery and properties, the cost of electric light, traveling expenses of actors, and the proportion of general expenses attributable to the particular play.

- 2 Q. Does it frequently happen that in producing successive scenes of the same motion picture drama it is necessary to transport a company of actors to points greatly distant from the studio where the first scene, or some of the scenes are taken? A. Yes, this is very common, and in fact necessary. It is a very common thing for the producers to send companies of actors to the Adirondacks, and to Maine, for the purpose of taking Klondike pictures, and they are shifting around all the time to find suitable locations where outside door scenes can be taken.

- 3 Q. For instance, if Mr. Selig, or Mr. Spoor, in Chicago, were producing a picture where one of the scenes takes place on board a trans-Atlantic liner, would it be necessary for him to transport his company from Chicago to New York for that purpose? A. Possibly not in that case, for there are very large vessels on the Great Lakes that might be satisfactory as representations of an Atlantic steamer, but other illustrations might be given where a company would be transported over very long distances. For instance, the daily papers of two or three days ago spoke about the taking of a picture called "Soldiers of Fortune" that necessitated the sending of a company to Santiago de Cuba.

Q. Is that a dramatization of Richard Harding Davis' story entitled "Soldiers of Fortune"? A. So I understand.

Q. Does the necessity, though, of transporting a company of actors from place to place constitute quite a factor—

A. (interrupting): Oh, yes—

Q. (continuing)—in the negative cost? A. Yes, it is likely to be a considerable expense; and another expense

that, perhaps, you have not considered is the waste of time—a company for instance might go up to Maine for the purpose of taking two or three scenes in a play, and be stornbound for a week or so, and not be able to take those scenes until the sun came out. Frequently companies are loading around for days at a time, without being able to do anything in the way of results, or rather get anything in the way of results.

Q. Then the position of a motion picture producer who has taken his negative is somewhat analogous, is it not, to a magazine publisher when he has the type all set up and ready for printing? A. Yes, I think the analogy is very close.

Q. If the producer manages to dispose of only one positive, the entire negative cost is charged on that positive, of course, is it not? A. Yes.

Q. And his profit depends entirely on the number of prints he may dispose of of a given picture? A. That is correct, and very slight fluctuations in the number of prints are of importance. For instance, if, under present conditions, it is necessary for the producer to sell thirty prints of a subject in order to cover the negative cost,—then if he sold twenty-nine prints he would lose money, and if he sold thirty-one prints he would make money, and yet the difference between twenty-nine and thirty-one, perhaps, superficially considered, would not appear important.

Q. Would you say then that the production of a motion picture play involved many speculative matters? A. The art is highly speculative. The producer might calculate the cost of a negative, and find that he was two or three hundred per cent out of the way—the same element of speculation that is present in the regular theatrical business,—because it is known that more plays are failures than those that succeed.

Q. Does it frequently happen that a motion picture play, which has been produced at great expense is a total failure with the public, just as in the regular theatrical business? A. Yes, sir; some pictures are looked upon by theatres as of so little interest that they refuse to run them, and try to change them for something else.

Q. What is the average duration of the performance of a motion picture play? A. A single play contained on one

- 1 reel would occupy about fifteen minutes of time, but this varies, of course, according to the speed with which, or at which, it is run through the machine. Fifteen minutes is about the normal time.

Q. How many plays are usually given at one performance? A. Generally three or four; sometimes as high as seven or eight.

Q. In the case of a motion picture play involving four to eight reels, as is sometimes the case, what is the length of the performance? A. From one to two hours.

- Q. Does it frequently happen that a performance is entirely devoted to the production of a single play, or the exhibition of a single play, just as on the regular dramatic stage? A. That is the form of entertainment that is apparently developing in this country.

Q. Has the tendency been in recent years to lengthen the performances in the regular motion picture theatres? A. Yes, it has. In the early days it was quite customary to run only a single reel, and this was generally cut in two on Saturdays so as to keep the audience moving. These were the days when the pictures were shown largely as matters of novelty.

- Q. For how long a time is the same picture shown, or the same play shown in the same theatre? A. Generally a picture is run only one day, but in some localities sometimes it is run for two or three days.

Q. Taking into consideration, therefore, the short time which an exhibitor makes use of a play, would it be financially practicable for him to obtain these pictures direct from the producers? A. No, sir, not when you take also into consideration the fact that he only gets five or ten cents admission.

- Q. Have you found that the exhibitor objects to the production of a play which has been produced in a neighboring theatre only a short time before, or concurrently with the production at his own theatre? A. Yes, he does object to this. This is called "repeating," or, in the case of where a programme, or substantially the same programme is simultaneously shown in two neighboring theatres it is called "conflicting," a conflicting program. I think that exhibitors without exception are very much opposed to repeating and conflicting programs. They say that if a pic-

ture has been shown in their competitor's theatre before it gets to them it has lost its drawing power.

Q. And that objection is based on the unwillingness of the public to see the same play a second time, is it not? A. Yes, sir.

Q. Well, does the length of time which any given copy has been in use affect the desirability of the picture from the standpoint of an exhibitor even though it may not have been shown in his own town or neighborhood? A. Yes, the theatres, of course, try to get the pictures at as early runs as possible; and they also object to pictures which have been worn or injured by previous exhibitions.

Q. Have I asked you yet, Mr. Dyer, to explain what is meant by "release date" in the motion picture business? You may answer that question anyhow. I do not think you have touched upon that subject. A. Release date is the date set by the producer on which it is released for exhibition. Release dates are used in cases of magazines, and we also used release dates in connection with the photograph business, refusing to allow jobbers or dealers to ship them out of their stock before 3 A. M. of the release date. The release date rule was introduced for the purpose of preventing unfair practices on the part of exchanges, so that one exchange, if it should accidentally come into possession of a picture before its competitor, would not thereby have an advantage over his competitor. Release date is not particularly important under the conditions of the General Film Company, except as a means for determining on the value of the service—so that a theatre will be able to tell whether it is getting a first-run reel, if it is paying for first-run service.

Q. I think one of the witnesses for the petitioner has testified that the release date rule originated with the Patents Company. Is that correct? A. No. I am quite sure that under the Edison license the films were released on definite release dates, and I believe that some of the producers were using release dates before the time of the Edison license.

Q. And the release date rule was a trade custom long established and well established in the business prior to the organization of the Patents Company? A. Yes.

Q. A trade custom? A. Yes.

Q. In this connection, Mr. Dyer, I would like to ask

1 you if you happen to know whether your competitors have a release date rule? A. They have, the same as we have.

Q. That rule is regarded of considerable importance, is it not, by the manufacturers? A. I think so. It enables the value of service to be accurately measured. If a theatre is paying for first-run service and gets a picture on the date of release advertised in the trade papers he knows he is getting what he pays for, but if we didn't have the release date we probably would have arguments all the time in convincing theatres that we were giving them the films that they had contracted for.

2 Q. Would a violation of that rule, even of so much as a quarter or half an hour at times work injury in the business? A. Yes. Any violation would be likely to work injury, and, of course, if you have a rule you have to enforce it, and a violation to the extent of a quarter or half an hour is as bad as a violation of two or three days. I recall that during the time that we were in competition with the Kinetograph Company, in Atlanta, last Spring, we had a very important customer in Chattahoochee, who was taking our complete output in three theatres, and the Kinetograph Company had a single customer there who was using the same output in his theatres, showing the entire licensed output. The films ordinarily left Atlanta by a train leaving about 8:30. There was a train called the Dixie Flyer, that reached Atlanta at 7:50, but neither of us was able to get our films on that train.

3 Q. What is the release date hour? A. The release date hour is eight o'clock. They were somewhat sharper than we were, and kept track of this Flyer, and on two or three mornings when it was about half an hour late, they managed to get their films on the train, and reached Chattahoochee two or three hours before we did, so that their theatre was able to show films in advance of ours. This was not a violation of the release date rule, but shows the importance of fifteen minutes or an hour's leeway in this business.

4 Q. Who is it that determines the length of the program, and the frequency with which it is changed? A. The theatres in a given locality generally co-operate together and use programs of substantially the same length, and with the same changes per week. That is to say, in some localities the films would be changed every day, and in

others they may change two or three times a week. This seems to be a matter that the theatres regulate themselves. Therefore when a theatre owner comes to one of our branches for service he generally requires service that will enable him to compete on an equality with his competitors.

Q. Will you explain what is meant by "first run," "second run," and "third run," etc., in the business? A. Ordinarily a first-run film is a film that is shown on its release date. A second-run film is shown the day after release date, and so on; but in some localities the exhibition of a first-run film means a film that is shown for the first time in that locality. Thus, for example, in Jacksonville, Florida, a first-run film, as I remember it, is about a week old.

Q. Isn't one of the chief problems of an exchange to keep all of its pictures in constant use? A. That is the principal object of an exchange because it is necessary that the films should be kept at all times in as continuous use as possible with minimum periods of idleness. When a film is idle, and lying on a shelf in an exchange, it is not earning anything. The film business, or rather the exchange business, is a business with tremendous depreciation. It is like the ice business, because the value of the product is melting away every day. The greatest value of the film is in the early runs, and it is particularly important to have no blank spaces on the books indicating dates of idleness, particularly in the early runs of the films. This problem would not be difficult with only one film, but when each exchange is buying from thirty to ninety reels per week, and has stocks on hand of thousands and thousands of films, and is supplying from a hundred to three hundred customers, and each customer is taking a service of from twenty-one to fifty reels per week, and the service is changed from every day to two or three times a week, the problem is exceedingly difficult to keep the films always in use, and the successful film manager, or exchange manager, rather, is the one who will get the maximum use out of the largest number of films at all times. If the periods of idleness are considerable, then the expense to the exchange is high, and the price of service to the exhibitor is necessarily higher. So that the object of the business is to try to keep the films busy at all times, so that the cost of the service may be kept as low as possible.

1 Q. So if a picture is idle on the second day after its release, that is to say, is not exhibited anywhere, will a theatre give as much for that picture on the third day following its release as it would the second day, it not having been shown but once before? A. No. The theatre is not interested in our troubles. He does not care whether we rent it on the second day or not.

Q. What would represent a fair average of the cost to the exhibitor of a first-day picture?

2 Mr. GROSVENOR: Are you talking about here in New York City or in some small country town?

Mr. CALDWELL: I will say in New York City.

The Witness: The cost in New York at the present time is about seven dollars per day.

By Mr. CALDWELL:

Q. And for the second day run? A. I think, about five dollars, but I do not keep those figures in memory. It is all subject to competitive conditions.

3 Q. Then, in New York City a theatre taking a picture which was idle on the second day would not be willing to pay five dollars for it? A. Not the second day price. He pays the price he agreed to pay. He does not make his agreement for a thirteen picture with any knowledge of whether the picture will be shown for the second time, or whether it will be shown at all on the second day.

Q. Then the periods of idleness of any given picture represent an absolute loss to the exchange? A. Exactly; the same as when a day laborer is incapacitated by rheumatism, he does not earn anything the day he is not working.

4 Q. What relation is there, if any, between the number of customers served by an exchange, and the cost of the service to a customer? A. It is, of course, desirable that there should be as many customers as can be handled with the available supply of films, so there will be minimum periods of idleness, because in this way the service is handled at its maximum efficiency, and the price of the service may therefore be low. If there are few customers, and considerable periods of idleness of the films, the expense of the service is

proportionately increased and the cost to the exhibitor is likewise higher.

Q. Can a single exchange supplying a given territory supply a better and cheaper service to the exhibitor than if that same territory was served by two or more exchanges?

A. Yes, sir; I think so.

Q. Why? A. I think it is the universal experience in almost every business that a single unit can give a cheaper service than two small units whose aggregate size is equal to that of the large unit. The small exchanges would have proportionately high expenses; each would have to have a manager, and the number of employees required to run two small exchanges would be more than would be required to run a single large exchange. I believe, also, that with two small exchanges the periods of idleness of the films would in the aggregate be more than with a single large exchange, so that the service would be less efficient.

Q. You have already explained what is meant by a repeating program. What is meant by a conflicting program?

A. That is where repeating takes place to an aggravated extent, where substantially the same program, or at least the principal films of the program, are simultaneously shown in two competitive theatres. This was one of the evils that was corrected by the General Film Company.

Q. Doesn't it usually happen, though, where two or more exchanges serving the same territory are obtaining their pictures from a common source of supply? A. That was the practice. Even at the present time, with branches of the General Film Company located in a single territory, as, for example, Chicago, we have from time to time trouble from this source, although those branches are under one common control.

Q. That is considered an evil in your business, and which you promptly correct whenever your attention is called to it? A. Absolutely. It is a source of great evil, and whenever it happens it results in a loss of business.

Q. Do you consider it desirable, from the standpoint of the exhibitor, that each exchange in a given territory should limit itself to the productions of a given number or group of producers whose pictures may not be obtained by any other exchange in that territory? A. Yes, sir; I think that is the only way the business can be effectively handled. It is necessary that the danger of conflicting programs should

1 be removed. If there were two or more exchanges supplying
 2 service in the same neighborhood, there would always be the
 danger of conflicting programs. In fact, before conflicting
 programs were eliminated, a theatre having picked a certain
 film was afraid to advertise it, because he knew that if he did
 his competitor would probably get the same picture from
 some other exchange and show it in advance of his advertised
 date, so as to take advantage of his advertising expense.
 This is not supposition, but at one time was a very real evil,
 so that as a result of it the theatres never advertised their
 3 films in advance, and the audience never knew what they
 were going to see until they came down to the theatre on the
 night of the exhibition. At the present time, without con-
 flicting programs, a theatre is able to advertise its program
 two days to a week in advance, and, in fact, it is quite a com-
 mon thing for theatres nowadays to get out printed programs
 giving their entire shows for all the week, so that people can
 go on a certain night and see a particular picture.

Q. Is it considered just as objectionable that the same
 motion picture be exhibited in two theatres in the same town
 or in the same neighborhood on the same night, as would be
 3 the giving of two performances of a regular play, "Within
 the Law," for instance, in two neighboring theatres, or in
 two theatres in the same town on the same night? A. It is
 considerably more objectionable, for the reason that a good
 many patrons of picture shows are called "Moving Picture
 Fans" who occupy the same relation to the picture business
 that baseball fans do to the baseball profession. They go to
 two or three moving picture shows every night, and in the
 case of a theatrical performance of "Within the Law," that
 could be seen, of course, only once by any one person, whereas
 that person could go to two moving picture shows the same
 4 evening. Therefore, if the two moving picture shows gave
 the same program, he would only go to one, whereas if they
 had different programs, many patrons go to both.

Q. What is meant by special feature films? A. At first,
 all the films made, or practically all of them, were in one
 reel. Then, beginning, I think, early in 1912, and follow-
 ing the lead of the European producers, American pro-
 ducers began to make multiple reel subjects in two or
 three reels. At first these multiple reel subjects were
 generally a single reel subject stretched out to two reels

by putting in superfluous scenes, or lengthening out neces-
 sary scenes, but later on the character of the subjects
 began to justify the length, and they became quite popular.
 These at the time, were called special feature subjects, and
 they were put out to the exhibitor at an extra price, but
 afterwards they came to be included in the regular pro-
 gram, as part of the regular output, and these are not called
 special feature subjects any more. At the present time, a
 special feature subject is a subject generally of sufficient
 interest to make a special appeal to the patrons of a
 theatre, and preferably of sufficient interest to permit the
 theatre to raise its price of admission. It may be only a
 single reel, but that reel might possess extraordinary in-
 2 terest, as, for example, views of some person very diffi-
 cult to photograph, like the German Emperor, or possibly
 scenes of an actual battlefield, from the late Italian War.
 A special feature subject at the present time is also one
 of from four reels or more in length, specially finely made,
 and preferably with some well known stars in it, as for
 example, "Que Vadis?"

Q. Mr. Dyer, I show you here, the manuscript of a mo-
 tion picture play, or scenario, entitled, "Agnes," and will
 ask you whether that is fairly illustrative of the better
 class of motion picture drama, as now shown on the mo-
 3 tion picture stage? A. Yes, I would consider this the
 scenario of a special feature film.

Q. I do not want to encumber the record by offering
 that in evidence, but I would ask you to describe, for the
 purposes of the record, just what that scenario is. What
 it comprises.

Mr. GROSVENOR: Has this been gotten out by any-
 body?

The Witness: The Vitagraph Company.

Mr. GROSVENOR: Then it has already been pub-
 lished?

The Witness: It has been made, but it has not been
 released as yet. Or at least, it is undergoing production
 at the present time. It has not been finished.

1 Mr. GROSVENOR: Has it been advertised yet for release?

The Witness: Not that I know of.

By Mr. CALDWELL:

Q. Will you proceed? A. The scenario or play is, in four parts, each part intended to occupy a reel of a thousand feet. At the beginning of each part, is a brief synopsis of the action, or story, to be told, so as to give the director a general idea of the plot he is expected to portray. Then follows the cast of characters, so that the director will know how many actors to assign to the play, and the parts they are to take. Then follows a list of props, so that he may be advised as to what to look out for in connection with this particular detail. Then follows a list of the scenes. On the first reel of this picture, there are twenty-eight scenes, which, of course, would be impossible with a regular theatrical performance, but becomes possible on account of the extreme flexibility of the motion picture play. Altogether there are sixteen sets in which these twenty-eight scenes take place. For instance, one set represents the library in the Belgard home, in which eight of the scenes take place. Following this is a description of the action to be portrayed by each actor in each of the scenes, and from time to time certain words appear, which the actors are required to speak. For instance, in the fourth scene, the mother meeting her daughter, says, "Wherever have you been?" In the seventh scene, Agnes says, "Wasn't it splendid?" And so on. The other parts are of the same general character, and I need not specifically refer to them, except to call attention to the fact that for the second reel one of the properties required is a steam yacht, which, of course, could not possibly be used on the regular stage. Altogether, this play required about sixty pages of type-writing, merely for the stage directions to the director.

Mr. GROSVENOR: I want to ask one or two questions for the purpose of making objection. You did not get up this scenario, and it was not gotten up by your company, was it?

The Witness: My company is not interested in the production of plays.

Mr. GROSVENOR: Then you had nothing to do with getting it up, did you?

The Witness: I did not.

Mr. GROSVENOR: I object to all this testimony about this scenario, the witness not being properly qualified.

Mr. CALDWELL: My question was whether that was fairly representative of the better class of motion pictures in vogue today, and he said that it was. He is the executive head of the General Film Company, one of the largest distributors of motion picture plays to theatres, and is in direct touch with the exhibiting theatres, and, I think, is therefore qualified to say whether this is a fairly representative motion picture drama.

Mr. GROSVENOR: I object to all this testimony as immaterial.

By Mr. CALDWELL:

Q. Mr. Dyer, the General Film Company deals in projecting machines, does it not? A. Yes, sir, it acts as dealer for most of the standard makes of projecting machines.

Q. What percentage of the revenues of the General Film Company, gross revenues, is derived from the sale of projecting machines, as compared with its revenues from the distribution of motion pictures? I am not asking you for exact figures, but approximately? A. Probably less than two per cent.

Q. Then the projecting machine business is a negligible quantity as compared to the gross volume of your business, is it not? A. Yes, sir.

Q. It is merely incidental, is it not, to your main business, that is, of supplying motion picture dramas to public theatres? A. Yes. We carry a line of machines so as to make sales when customers come into our exchanges, largely as a matter of accommodation to them. Generally

1 in every locality where we have a branch, there are other
dealers in machines who make quite extensive selling ef-
forts, to dispose of them.

Q. There is only one of the defendants in this case
that either makes or sell projecting machines, isn't that
true? A. Either makes or sells?

Q. Makes or sells projecting machines. A. The Gen-
eral Film Company sell.

Q. I mean now, of the so-called licensed manufacturers
or producers. A. Yes, sir. The Edison Company is the
only concern that makes or sells projecting machines.

Q. While you were connected with the Edison Com-
pany, was there any agreement or understanding with any
other manufacturer of projecting machines as to the
prices for machines? A. No, sir.

Mr. GROSVENOR: I think that question should be
made more definite as to time.

Mr. CALDWELL: The question was, while he was
connected with the Edison Company.

8 By Mr. CALDWELL:

Q. And at what time were you connected with the
Edison Company, Mr. Dyer? A. From April 1st, 1903,
to December, 1912.

Q. Was any price of projecting machines ever set by
the Edison Company, as a result of the license agreement
with the Patent Company, or as a result of any conference,
agreement or understanding with anyone outside of the
Edison Company? A. No, sir. The only thing done by
the Edison Company as a result of the license agreement
was to withdraw a very cheap machine, known as the

4 "Universal," which it was selling for \$75, and which was
not a popular machine. It was a very cheap machine, and
its sales would have been discontinued anyway, even if the
license had not included the restriction requiring us to
withdraw it. The art had developed beyond that type of
machine, in fact, the art is developing now, I think, to-
wards better and better machines, and I presume the future
will see more expensive machines than the past. The cost
of a machine is very small, compared to the other invest-
ments that the theatre has to make, and the perfect opera-

tion of a machine is a very important factor in the success
of a show, so that it would be poor economy for a theatre
to economize by putting in a cheap machine.

Q. State what connection you had with the formation of
the General Film Company. A. I did not have a very
active connection with the formation of the General Film
Company, except to discuss the question from time to time
with the several licensees, when we were considering the
possibility of starting a distributing concern. This was
shortly before the company was actually founded. I was
quite opposed to the plan of starting a concern that would
compete with our customers, because I was afraid that
we would alienate their support and drive them away from
us. I had had some experience along this very line in
the phonograph business. The phonograph business, as I
said yesterday, at the beginning of the Edison licensee ar-
rangement, was larger than the combined business of all
the motion picture producers, that is to say, the National
Phonograph Company was doing a larger business than all
the motion picture producers who were licensed, and that
was my principal work, looking after the affairs of that
concern. Now, the National Phonograph Company had
been operating under licenses in connection with phono-
graphs and records, and had licensed jobbers and dealers in
very much the same way as the licensees in this case, and
we had about thirteen thousand dealers who were licensed.
We did all of our distributing through independent jobbers,
and these jobbers in turn dealt with the dealers, and it had
always been an axiom with the Edison Company, that it
must not in any way interfere or compete with their cus-
tomers, so as to always retain them, and have their sup-
port.

8 Mr. GROSVENOR: By the customers, you mean
the jobbers?

The Witness: I mean the jobbers.

Mr. GROSVENOR: And by the customers in the
other line of business, you mean the rental ex-
changes?

The Witness: The rental exchanges.

1 Mr. GROSVENOR: Thank you.

A. (continuing): The Columbia Phonograph Company was a competitor of the National Phonograph Company, and in addition to being a manufacturer of phonographs and records, they tried to deal through jobbers, and at the same time established stores all over the country, from which they made wholesale and retail sales, and they were not able to build up very much of a business, because the dealers and jobbers would not patronize them, because they felt that they were interfering in their fields, and we were able to build up a very large business by dealing with the jobbers in this way. So that I was opposed to the plan of starting this exchange, and agreed to it only after having been convinced that it was a commercial necessity to do so, and after the plan was approved of, the gradual carrying out of the plan was turned over to Mr. Kennedy, who started the company and put it on its feet. He seemed to be perfectly willing to do this, and as far as I was concerned, I was entirely willing to let him undertake the work, so that my connection with the company was not any further than to approve the plan, after having discussed it with the several manufacturers, and co-operating with them as loyally as I could.

By Mr. CALDWELL:

Q. Do you know whether the other licensed manufacturers and importers, or any of them, entered into this plan with reluctance?

Mr. GROSVENOR: I object to that as calling for improper testimony. The way to prove any such thing, of course, is to call these other manufacturers or producers, and not to ask about discussions.

By Mr. CALDWELL:

Q. You may answer the question, yes or no. A. Yes. That seemed to be the opinions of most of them.

Q. Did you have any discussions with any of them on the subject? A. Oh, yes. My answer was based upon what I had gathered from my discussions with them. They had about the same views that I had, and I think they went into

the plan with great reluctance, and with the feeling that the chances of failure were probably much greater than the chances of success.

Q. Was it started more or less as an experiment? A. Why, yes, in the sense that the chances of a failure seemed to be greater than the chances of success, I would call it an experiment.

Q. Did any of the manufacturers assign any reason for their reluctance to enter the exchange business?

Mr. GROSVENOR: I object to that as calling for hearsay.

A. Yes, I have already explained that we were dealing with a large number of exchanges, and that was the principal reason for the feeling of reluctance on the part of the several producers that if they should begin to compete with their customers, they might alienate their support.

Q. And did they fear a loss of market in the leasing of their film? A. That would naturally be the result, yes, sir. That is why they were afraid; afraid it would hurt the business.

Q. Was it supposed at the time that any profits that they might make in the exchange business would offset possible or probable losses in their leasing of film? A. I think they were all hopeful that some profit might be made in the exchange business, but I do not think they felt very sure about it. But of course, their idea was, or at least my idea was, if any profits were made, they would offset to a certain extent any loss that we might incur by losing the support of the customers that we were supplying with film.

Q. The petitioner sought to show in this case that the organizers of the General Film Company, prior to its formation, made an estimate of the value of all licensed exchanges in the country, and that a schedule of prices was prepared, which they would be willing to pay for these exchanges, and that the General Film Company at its inception, was formed for the purpose of acquiring all of these exchanges. Do you know anything about any such estimate or schedule? A. No, sir, I do not.

Q. Was it the purpose of the General Film Company at the time of its formation, or even shortly after its forma-

tion, to acquire all the existing rental exchanges? A. No, sir. The purpose of the General Film Company, at least as I understand it, was to provide a source of distribution for the licensed film that could be started in any territories where the conditions seemed to be peculiarly dangerous, and where such an exchange was desirable. It was designed to represent what an exchange should be, so as to show other exchanges how to handle the business.

Q. State what part, if any, you took in the negotiations for the purchase of property from any of the licensed exchanges prior to, say, January 1st, 1912? A. I took no part in any such negotiations.

Q. Was any threat ever made by you or to your knowledge by any other officer or director of the General Film Company to any exchange that if it refused to sell its business, its license would be cancelled by the Motion Picture Patents Company? A. No, sir.

Q. Did you, as an officer of the Patents Company, or to your knowledge, did any other officer of the Patents Company ever make such a threat? A. No, sir.

Q. Did you, or did, to your knowledge, any other officer, agent or representative of the General Film Company state to any exchange owner, officer, agent or representative of any exchange, that if such exchange did not sell out to the General Film Company, the General Film Company would establish a competing branch? A. No, sir.

[illegible]

- 1 General Film Company, it is necessary that the branch manager should have considerable latitude in determining questions of price, because if these questions were referred to the home office, the complications would be interminable. The branch managers run their branches with as little trouble and dictation from the home office as possible. In fact, the only dictation they receive from the home office is in connection with matters of policy. Each branch manager is running his exchange as far as he can, practically as an independent business, and under competitive conditions, is making the best showing he can for his branch.

- 2 Q. What is the practice of the various branches in preparing a program for its customers? A. Ordinarily the programs are prepared by the branch manager, or rather, by the bookie or hookers, having in mind the service contracted for. If, however, the program of any particular day is not properly balanced, that is to say, if it contains, for instance, three dramas, the theatre generally asks to have it changed, by substituting a comedy for one of the dramas. In some of the branches, we have booking systems that give to the theatres certain definite makes of films on certain definite dates, and while this gives variety in connection with brands or makes, it does not give variety in connection with subjects, and here again, we have to make adjustments all the time to balance up programs. This is one of the great problems of the branch manager, trying to satisfy so many customers. In some localities, such as Boston, the theatres indicate to the branch manager a list of films from which they wish to have their programs selected. That is to say, if a theatre is entitled to three reels on a given day, he will give the branch manager a list of six subjects, and ask to have the three reels selected out of the six subjects suggested by the exhibitor, and this is done as much as possible. Then, in almost every branch, there are a few customers who take a great deal of interest in the selection of their programs, and these people can be seen hanging around the bookie's desk, trying to pick out certain films that they want, but in a very large majority of cases, the programs are selected by the bookies, who are skillful men, and who try their best to give to the theatres a satisfactory, inter-

esting, and well-balanced program. And they try as far as they can to carry out the wishes of the exhibitors in connection with the character of the reels furnished to the exhibitor. Some exhibitors, for example, like to have educational films, and we try to let them have them.

Q. Is it your experience that for the most part the exhibitor prefers the branch manager to make up the program for him? A. Yes, I think so. The exhibitor does not pay very much attention to this question, and he has been getting satisfactory service, and knows the programs furnished by the branch manager will be acceptable, and he is perfectly willing to be relieved of the duty of picking out his programs himself. We do not have many complaints, when you consider the large number of theatres that we supply service to—the complaints are really very small.

Q. Is it within the power of the General Film Company to satisfy the wishes of an exhibitor with respect to the choice of program, to a greater extent than when there were many licensed exchanges in the field? A. Yes, I think that is so, because the General Film Company has a much greater variety of films to make the selections from than would be the case with a large number of small units.

Q. Do you happen to know whether the same system of preparation of program by the exchange is followed by the unlicensed exchanges in their dealings with their customers? A. Yes, sir, the General Film Company, having pointed out the way to do the business in a businesslike manner, has been followed by its competitors.

Q. Was this selection of program by the exchange, a trade custom more or less followed even prior to the Edison licensing arrangement? A. Yes, sir, it all grew out of the early conditions, where the demand for film by exhibitors was so great that they took anything they could get. Anything that was a picture was sufficient for their purpose, because the pictures were looked upon solely on the grounds of novelty, and, I presume, the continuance of the branch manager in sending out programs is simply an outgrowth of this early custom. That is to say, the theatres never did select the programs, and do so now, as I said, only in a very few cases.

Q. Who is it that determines what pictures shall be ordered for each branch by the General Film Company? A. The branch manager of each branch has the unlimited dis-

1 cretion of ordering such pictures as in his judgment may meet the public demand in the territory supplied by him. In other words, so far as buying the film is concerned, the branch manager is independent of the home office, and acts exactly with the same freedom that he would have if he owned the business himself.

Q. If the branch manager finds that there is a greater demand in his territory for pictures turned out by a certain licensed producer, than there is of the pictures of other licensed producers, is he at liberty to order the pictures that are most popular with his patrons, or is he compelled to take the pictures of all of the licensed producers? A. He is not only at liberty to order these pictures that are demanded, but he is expected to do so, and as a result of this independence of action on the part of the branch managers, the orders for the several pictures of the licensed manufacturers vary as much as three hundred per cent, or more; that is to say, some reels will sell to the extent of three hundred per cent. more than other reels.

Q. Have you stated why the simultaneous service by two or more licensed exchanges in the same territory prevents the theatre from advertising its program in advance?

A. Yes, sir, I have explained that. The old practice was for the theatres to conceal the programs, so that their competitors would not get the same programs, and take advantage of their advertising expense. I might say that even at the present time when we have booked a theatre with a certain film, we sometimes have the competitor, who may be getting service from us, come to our branch and try to get us to give him the particular film that the other theatre has advertised, and they seem to have great difficulty in understanding why we should refuse to let them have it.

Q. In what manner does the exhibiting theatre announce its program or advertise it in advance? What are the different methods? A. Sometimes they would issue a very nicely gotten up little program that will give all the shows for the entire week, as I have stated before. Then, it is very common for theatres to get posters in advance of the pictures that are coming on later, and put these posters in their lobbies, so that their patrons will see what to expect later on. Then, the theatres are getting in the way of

advertising in the daily papers to a greater or less extent, and it is quite a common thing for theatres to make use of heralds or hand bills, announcing the giving of a certain motion picture play on a certain day, and in the case of the large theatres, bill-posting is quite extensively used, just like the bill-posting in connection with a regular dramatic performance.

Q. Does the General Film Company supply these posters to any of its customers? What is the practice in that regard? A. The posters are printed by regular lithographic concerns, and sold generally to people who want them, but we maintain in a great many of our branches, poster departments, where we keep a supply of posters, which we rent or sell to exhibitors either simultaneously with the films, or beforehand, so that they can announce the films in advance. Then, in some places there are separate poster companies that maintain offices in the neighborhood of our branches, and who deal with the poster business exclusively, or compete with us. In Chicago, a separate poster company maintains quarters in all three of our branches, and does the entire poster business for those branches. I think, to a limited extent, some of the larger theatres obtain posters direct from the lithographers who make them.

Q. Do the producers of the pictures sometimes supply posters? A. Not ordinarily, but I think in the case of "From the Manger to the Cross," the Kalem Company did. Q. Do they supply the cuts to the lithographer from which the lithographer makes the poster? A. Certainly. The producer of the play furnishes the necessary photographs to the lithographer, in order that the lithographer may make up the posters of the various sizes.

Q. Whatever business the General Film Company does in posters is merely a matter of convenience, is it not, to its customers? A. Very largely so. It is a very small matter. In fact, it generally causes more trouble than it is worth, but it is desirable to have the posters for the customers, so as to let them get them from our branches if they want them.

Mr. CALDWELL: It is now our usual time of adjournment, Mr. Examiner.

Mr. CHORVON: I wish to notify counsel for the

1 defendants to please produce, when Mr. Marvin appears for cross examination, all letters written by the Patents Company in response to the letters addressed to the Patents Company, and which were introduced by counsel for the defendants during their direct examination of Mr. Marvin, these letters being from various exhibitors and rental exchanges, the production of the letters written by the Patents Company in response to the other letters being necessary in order that a full and proper cross examination may be made in regard to the letters which have already been introduced by the defendants.

2 Mr. KINGSLEY: I have understood right along that you were not going to cross examine Mr. Marvin until he was through. Now, do you wish him produced within a day or two for cross examination?

Mr. GROSSVENOR: No; the purpose of giving that notice is that you will have those letters ready when he does appear for cross examination. That is, I want to have it on the record that I have notified you to keep and retain and preserve and produce those letters.

3 Mr. KINGSLEY: When do you want to cross examine him? In a few days, or at the close of his testimony?

Mr. GROSSVENOR: I should rather postpone the cross examination until you have closed, but if you have not any witness to go on tomorrow, in order to save time, I will start with Mr. Marvin.

Mr. KINGSLEY: We will have a witness tomorrow.

4 Whereupon, at 4:40 P. M., on this 11th day of November, 1913, the hearings are adjourned until Wednesday, November 12th, 1913, at 10:30 A. M., at the Hotel Manhattan, New York City.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA,	} No. 889. Sept. Sess. 1912.
Petitioner,	
v.	
MOTION PICTURE PATENTS Co. and others,	Defendants.

NEW YORK CITY, November 12, 1913.

The hearing was resumed pursuant to adjournment at 10:30 o'clock A. M., November 12, 1913, at Room 159, Manhattan Hotel, New York City.

Present on behalf of the Petitioner, Hon. EDWIN P. GROSSVENOR, Special Assistant to the Attorney General.

J. R. DARLING, Esq., Special Agent.

Present also, MESSRS. CHARLES F. KINGSLEY, GEORGE R. WILLIS and FRIS R. WILLIAMS, appearing for Motion Picture Patents Company, Biograph Company, Jeremiah J. Kennedy, Harry N. Marvin and Arant Moving Picture Company.

J. H. CALDWELL, appearing for William Pelzer, General Film Company, Thomas A. Edison, Inc., Kalem Company, Inc., Pathe Freres, Frank L. Dyer, Samuel Long and J. A. Berst. Mr. HENRY MONTVILLE, attorney for George Kleine, Essanay Film Manufacturing Company, Selig Polyscope, George K. Spoor and W. N. Selig. Mr. JAMES J. ALLEN, appearing for Vitagraph Company of America, and Albert E. Smith.

1 Thereupon FRANK L. DYER resumed the stand.

Direct examination continued by Mr. CALDWELL:

Q. What is the effect on film of the sprocket holes being torn or enlarged? A. If the sprocket holes are torn on both sides of the film, the film will not feed through the projecting machine, and there will be danger of its being ignited. If the sprocket holes are torn on one side only of the film, it is likely to be fed irregularly through the projecting machine, and ride up on the sprocket teeth, so as to thereby stop the feeding movement. If the sprocket holes are enlarged, the successive pictures do not register accurately in the projecting machine, and produce jumping or irregular projections on the screen. Pictures that are projected on the screen, as is well known, are very much enlarged, so that any defect in the machine is correspondingly exaggerated.

Q. Could you state approximately the extent to which the picture on the film is magnified on the screen? A. About ten thousand times.

Q. So that the slightest variation in the correct position of the film would result in a very poor exhibition? A. Yes, sir.

Q. What is the effect of the film being scratched? A. A scratched film is one in which longitudinal scorings through then cut through the gelatine of the emulsion down to the celluloid base. Light is projected through these scratches, and interferes very materially with the projection. Where the scratch is considerable, as is the case with an old film, the repeated passing of the scratches across the eye give somewhat the appearance of a violent storm of rain, and these pictures were therefore called "rain storms." A. I recall seeing a play in New York written by my cousin, Mrs. Kate Douglas Wiggin, called "Rebecca of Sunnybrook Farm," where this defect was utilized to produce the effect of rain on the stage.

Q. What is the effect on the film of a break or tear necessitating splicing? A. It produces a hiatus in the reproduction. A foot of film, roughly speaking, corresponds to about one second of time. Therefore, if a foot of the film is cut out, a second of time is lost. This is very frequently observed in motion pictures where, for example, a man is

shown walking across the scene, and instantaneously he appears several feet in advance. This is called a "jump," and is the result of a splicing requiring the cutting out of a portion of the film.

Q. Does it often happen that the break or tear is longer than a foot? A. Oh, yes. I simply mentioned a foot to indicate the period of time that would be involved. Sometimes several feet would be taken out.

Q. Does it sometimes happen that a picture after a considerable usage loses as much as ten or twenty per cent. of its footage? A. That might happen in special cases, but I think that is rather a high loss.

Q. Which would you consider high, ten or twenty? A. I would consider both figures high. I am now speaking, of course, of averages, not of special cases.

Q. You have stated that some of the releases of the licensed producers consist of educational and scientific pictures. In what places are these pictures exhibited other than in the regular motion picture theatres? A. I think all of the manufacturers put out scientific and educational pictures from time to time, and that these pictures are not limited only to certain producers. In addition to the regular motion picture theatres these pictures are shown in private exhibitions, in clubs, various penal institutions, insane asylums, and poor houses. We maintain quite intimate relations with the Navy Department, and supply these and other films to a great many of the American warships. We also supply films for use at the various army posts throughout the country.

Q. By "we" you mean the General Film Company? A. I mean the General Film Company. And it is getting to be quite a common thing now for churches to use motion pictures at their social meetings, and in several cases ministers have used motion pictures in connection with their sermons.

Q. Are they supplied also to public schools? A. Yes, we also supply pictures to public schools, and to colleges, and other educational institutions.

Q. Does the General Film Company maintain an educational department for the purpose of supplying pictures to public schools, and educational institutions? A. Yes, we maintain an educational department for this purpose, and it is the practice, at least of some of our branches, to

1 maintain an educational catalogue of these films that are supplied to people other than the regular theatres.

Q. Mr. Dyer, I would like for you to look at Defendants' Exhibit No. 28, at page 1117 of the record, being a letter addressed to the Motion Picture Patents Company, by the Theatre Film Service Company, of San Francisco. It is signed "Theatre Film Service Company, per A. J. Clapham," who was a witness for the petitioner in this case, and in which letter he calls the attention of the Patents Company to the matter of returning old films, and states that it has been the experience of that exchange (the Theatre Film Service Company) that at least twenty-five 2 per cent. of a film is lost during the seven months of its lease, and in many instances it has been even greater than this, and he goes on to say that "we figured that we are returning about three reels for every two which we lease, and it strikes us particularly hard in view of the fact that we have no old stock on hand, other than that which is being constantly used," etc. Just read that letter, will you? A. Yes (examining letter), I have read the letter.

Q. Now, in view of the claim by that exchange that twenty-five per cent. of the footage is lost, would you say that ten or twenty per cent. was high after a film has been in constant use for a long period of time? A. Yes, I will think that percentage is high under the present conditions. My answer was based upon my observation of general averages. It might be that some particular exchange was using its films harder than others, or that some subjects were being used to a much greater extent than others, so that these large percentages of waste might be present. I don't think that is true at the present time.

Q. The character or condition of the projecting machine has something to do also, has it not, with the effect on the film, tearing it, etc.? A. Yes, that, and the skill with which the machine is operated.

Q. During the period of the Edison license, and also since the organization of the Motion Picture Patents Company, have you ever known of any demand on the part of a licensed exchange to accumulate a library of so-called educational or scientific subjects? Have you ever heard of such a demand? A. I am not able to speak as to the conditions at the time of the Edison license, but the General Film Company has accumulated a library of educational

and scientific films in its educational department, and I think this library was the result of a certain demand, or of, at least, certain opportunities to do business. I know also, in the cases of our Indianapolis and Wabash Avenue branches, the managers have set aside scientific and educational films as a nucleus of a library, and issue their own little educational catalogues for the purpose of developing this business. The educational business, however, is very small compared with the amusement business, and it is not an entirely satisfactory business, because educational bodies are notoriously averse to paying much money for anything. They have to pay for the films, and there is no way of getting any return from the films, as is the case with the amusement side of the business, and, therefore, in the case of educational films, the expense of the service is kept as low as possible.

Q. While you were President of the Patents Company, did you ever hear of a complaint on the part of any licensed exchange that the provisions of the license exchange agreement requiring the return of film operated to prevent the accumulation of such a library? A. No, sir; I never did.

Q. In point of fact does it have such an effect? A. No, sir, in view of the comparatively small number of educational and scientific films with respect to the entire output.

Q. Explain the method of censoring motion pictures? A. So far as licensed films are concerned all the releases of the licensed producers are run off at an exhibition room of the Patents Company. I think, on four days of every week, before a body of censors, generally comprising men and women of various numbers; and the censors notify the manufacturers if any particular picture is objected in whole, or, if they object only to certain parts of the picture, they point out the parts that are objected to, and they also make suggestions before changing the picture in any respect that may be objectionable to them, and those suggestions of the censors are carried out by the manufacturers. That has to do, of course, with the National Board of Censors. There are other censorship in the country, but this National Board is the important body.

Q. Can you state any benefits or advantages resulting to the public from the formation and the operation of the Patents Company? A. Yes. I think the Patents Company was of public benefit inasmuch as it resulted in the

1 elimination of endless, or apparently endless litigation, on the subject of patents. It was of benefit to the public, because as a result of the ending the patent litigation, and the bringing about of a condition of quietude, the manufacturers were free to expand and enlarge their plants, improve the quality of the motion picture plays, and increase the number of subjects released. This assured men of capital throughout the country that there would be an available supply of motion pictures for use in the theatres, and, therefore, a great number of large, expensive, and well ventilated theatres were built, some of which were of advantage to the public, as these theatres gave the public the opportunity of seeing good, clean, high class, instructive exhibitions under favorable surroundings at an admission price of from five to ten cents. Then, also, the formation of the Patents Company brought about the so-called Board of Censors, and the result of this Board of Censorship was the elimination of objectionable pictures, and a very substantial increase in the tone of the pictures. Of course, the licensed producers did not adopt the suggestions of the National Board of Censorship for altogether altruistic reasons, because it was asking a good deal to expect them to agree with a non-official outside board who have the right to condemn or direct the entrenchment of pictures that may have cost thousands of dollars to make, but we felt that it was important that the public should feel that the pictures were being independently and honestly censored, so that they would have confidence in our productions. We also were afraid that unless some kind of censorship was encouraged in which the public would have confidence, that various local censorship boards would spring up all over the country, and interfere with the development of the business. In recent months several of these boards have developed, and they necessarily impose a tax on the business, which the public has to pay. The Patents Company also was of importance to the public because it brought the best, and at the time substantially all the producers of motion pictures together, in a spirit of friendly co-operation, and the difficulties and troubles encountered by one producer could be more readily remedied by discussing these problems with his competitors than would have been possible if these troubles and difficulties had to be worked out independently of each other. Also, by the bringing about

of this feeling and friendly co-operation among the producers, without in any way affecting the keenness of competitive relations between them, they were able to bring co-operative pressure to bear on the Eastman Kodak Company to improve the quality of the film, and reduce the price, and both of these factors were of public benefit. If there had not been this co-operation, the Eastman Kodak Company could have kept each producer off at arm's length, and probably this development would have been very slow. The Patents Company also were the first, or, at least, one of the first, to realize the necessity of doing away with the showing of pictures in absolutely dark theatres, and it maintained an exhibit at the Patents Company for a long time demonstrating how pictures could be shown in lighted auditoriums, and this work on our part was taken up by the trade papers, and the theatres throughout the country were convinced of the advisability of this reform, so that at the present time, I think, that all, without exception, of the motion picture theatres of the country are now showing pictures under reasonably good conditions of light. At least, we hear no further complaints about immoral practices that at one time were being constantly brought to our attention.

Q. Can you state any benefits or advantages to the exhibiting theatres resulting from the formation and operation of the Patents Company? A. Yes. Without the Patents Company, and under the conditions that existed, for example, at the time of the Edison licenses, every theatre that showed motion pictures necessarily infringed the patents of the Biograph and Armat Companies, and could have been sued for such infringement. The Patents Company gave these theatres immunity from patent suits. The rapid development of the business, after the Patents Company was formed, owing to the fact that the producers were relieved of the doubts concerning patent infringement, resulted in the making of more and better films, so that the theatres, therefore, directly prospered by reason of that fact, and as I stated in my previous answer, a great deal of new capital was invested in the theatrical business and new theatres were built.

Q. Can you state any benefits or advantages to the public resulting from the formation and operation of the General Film Company? A. The formation of the General

1 Film Company was of benefit to the public in a good many ways, at least, that is my very firm belief. It provided at its branches a great assortment of motion picture plays, so that the theatres that the public patronized were able to put out better and more varied programs. It inaugurated methods of inspecting and cleaning the films, which resulted in much better, clearer projection on the screen. It enforced the requirement for the return of old film, so that the character of the exhibitions in this respect was improved. It did away absolutely with conflicting programs, so that the public could go from one motion picture theatre to another and see a different program in each house. It minimized the repeating, so that the public would not see probably more than one reel in any program that they may have seen before, and in many localities, they would not even see one reel that had been repeated. It enabled the theatres to have their programs laid out in advance, so that the theatres were able to advertise the programs, and the public knew where they could see a certain picture in a given territory, and on what date, and they went to the motion picture show, therefore, with the same degree of certainty that they went to the ordinary theatrical performance, whereas, under the old conditions, the motion picture entertainment was largely in the manner of a surprise party. And the General Film Company, by reason of its businesslike methods, has been fairly consistent in supplying its programs to the theatres as contracted for, so that the public has not been disappointed in failing to see plays that may have been advertised.

Q. Has there been any tendency in recent years, on the part of unlicensed competitors, to turn out glaring and sensational posters? A. Yes. That is quite true.

4 Q. Did the General Film Company countenance any such movement? A. No. That is really another advantage that I think can be attributed to the General Film Company. We have tried to restrain any pressure from the manufacturers or producers to make glaring and vivid posters. As a matter of fact, a licensed theatre can generally be distinguished from an unlicensed theatre, by reason of the character of the posters. The unlicensed posters were almost always very glaring and vivid and sensational, although in this respect there has been a very decided improvement recently on the part of our competitors. As a

matter of fact, it used to be a very common thing to simply get hold of a lot of glaring and vivid blood-curdling posters and put them out in the lobby to draw the people in, and then have no picture that in any way related to the posters that were being shown.

Q. Do you recall that a bulletin was ever issued by the Motion Picture Patents Company on this subject of sensational posters? I hand you here a bulletin entitled, "Exhibitors' Bulletin No. 11," and ask you to read that. A. Yes, this is precisely the thing that I had reference to. Shall I read this into the record?

Q. No, you need not read it. You identify that as a bulletin sent out by the Patents Company on this subject on this date, November 21st, 1910? A. Yes, that is the date.

Mr. CALDWELL: I offer it in evidence.

The paper offered is received in evidence and marked Defendant's Exhibit No. 107, and is as follows:

Defendants' Exhibit No. 107. E. H.

MOTION PICTURE PATENTS COMPANY

80 Fifth Avenue
New York City

November 21, 1910.

Your attention is directed to the following Bulletin that was sent to Exchanges on November 7th, 1910:

"Legitimate motion pictures are occasionally made the subject of adverse criticism by reason of the use by the exhibitor of sensational and misleading posters that have been prepared without the co-operation or knowledge of the manufacturer of the picture.

"Exchanges are notified not to supply any poster for use in connection with any motion picture except posters made with the knowledge and consent of the manufacturer or importer of the motion picture."

From this Bulletin you will note that Licensed Ex-

- 1 changes will hereafter supply only posters that properly illustrate the motion pictures in connection with which they are issued.

The reputation of your own theatre is likely to suffer from the use of misleading posters, and your interests will be safeguarded if you use only posters that are authorized by the makers of the pictures that you exhibit.

MOTION PICTURE PATENTS CO.

- 2 By Mr. CALDWELL:

Q. Can you state any benefits and advantages to the exhibitor, resulting from the formation and operation of the General Film Company? A. The organization of the General Film Company has been of very great advantage to the exhibitor. First and foremost, it prevents the conflict of programs, so that a theatre is able to advertise its shows legitimately and without the fear that its competitor will run in the same show at an earlier date. This used to be the curse of the business. Then, the General Film Company also handles its films in such a way that except in very congested localities, repeating is minimized, and when repeating does take place, the effort is made to keep the repeating films back as long as possible, so that they are repeated in a given locality only after a considerable lapse of time. The General Film Company also inaugurated effective inspection and cleaning methods that enabled the theatre to give a better exhibition, which would be more satisfactory to its patrons. We also are able to give service to theatres with the same regularity as a moving newspaper, so that the theatres are always assured of having their shows, and in localities where there are possibilities of delay, such, for example, as in the upper part of New York State, during the Winter months, where trains are sometimes late, and in New England, in the Winter, we always keep on hand at each theatre—

Q. (Interpreting): At each theatre? A. At each theatre—a supply of reserve reels, so that the theatre will have a show in case the regular show does not arrive. We have been able, or, rather, we have been required by stress of

competition, to make the prices moderate with theatres, and have very substantially improved the variety of the program, and in many cases, the number of reels in the program, and in all cases the quality of the pictures that constitute the program.

Q. Were the Edison producing and importing licenses competing as between themselves, during the year 1908? A. Yes, sir. They were competing on questions of quality, and so forth, but there was a certain amount of co-operation on matters of trouble and mechanical defects, and factory breakdowns. For instance, if a manufacturer had some trouble in development, instead of having to begin experimenting to find out how his trouble could be remedied, he might find that one of his associates had encountered the same trouble and found the remedy for that trouble. But the competition was very active, as far as the business was concerned. Each one was trying to get as much business as he could.

Q. At that time, what was the most popular brand of film being exhibited in this country? In January and February, 1908? A. I think the Pathé pictures were the most popular of them, although the Biograph pictures came into vogue shortly afterwards, and have always been very popular.

Q. Then, had Pathé at that time established, so to speak, a standard of good quality? A. Yes, sir. The Pathé pictures were the highest standard known in the art at that time. They were pre-eminent.

Q. And it became the effort of the other licensed producers to reach and surpass, if possible, that standard that had been set by Pathé? A. Yes, sir, both photographically and in all other respects.

Q. Now, if all the licensees lived up to the schedule of minimum prices established by the agreement, in what respects were they competing, and how did such competition manifest itself? A. So far as I know, the producers did live up to minimum prices. Competition manifested itself between the licensees in the form of bulk sales of goods. If there was a certain minimum price, each producer would try to put the greatest value possible into the film, and the competition was entirely along the lines of trying to sell as many prints of a subject as possible. The licensees were competing in matters of scenarios, they all were trying to get the best

1 scenario they could, and there was a very intense competition even at that time on the question of the price of the scenario. Scenario writers would submit scenarios from one producer to another and get the best price from the one that was willing to pay the most for it. Then there was competition in the way of actors, each producer trying to get the best actors, so that as a result, the price of actors has very materially increased. When I was President of the Edison Company in 1908, \$50 or \$75 a week was considered a very good price to pay for an actor, because he was given employment all the year round, and was able to live with his family, and did not have to work at nights, the way they have to do on the regular stage, whereas at the present time, there are actors who receive from \$500 to \$1,000 a week for their services. There was competition also on the subject of advertising, each producer spending a great deal of money in advertising his films in the trade papers, so as to popularize them, and create in that way a demand by the public on the exchanges, so as to require the exchanges to buy particular brands of films. Then, the producers were sending men, traveling men, around among the exchanges, urging the exchanges to buy their films. Then, the various producers were also sending people around among the various theatres to talk up their films to the theatres, so that the theatres would try to get the exchanges that was serving the theatre with service to buy particular marks of films and, so far as I know, all the methods usually adopted by competitors were adopted by these particular competitors, to improve their business in the greatest possible way. Each one was trying to get on top, and each one was trying to pull the others down who might be above them. When I speak of prices of actors, I should also include the salaries of directors, and I think the salaries of almost all employees in the art have increased by reason of the competitive conditions.

Q. After the formation of the Patents Company, did its producing and importing houses compete as between themselves? A. Yes, sir, in exactly the same way, the same thing went on. Each one trying to do the best business possible, and first one would go on top and then another. They kept this competition up. There was absolutely no understanding or agreement among the manufacturers that there should be any division of the business. Each one tried to get as much as he could.

Q. This competition between manufacturers,—did it continue after the formation of the General Film Company? A. Yes, sir, it goes on in exactly the same way.

Q. And is that condition true today? A. It is.

Q. This competition for high-salaried actors and for the production of motion picture of great, rare, artistic merit, is it more active today than it ever was at any time before? A. Yes, sir. As an example, I had occasion a few weeks ago to visit the plant of the Vitaphone Company, and was very much surprised to see that all the leading stars drove up to the plant in the morning each in his own automobile with a liveried chauffeur on the front seat.

Mr. GROSSVENDOR: Interesting, but hardly relevant, I think, so I object to it.

By Mr. CALDWELL:

Q. Are these licensed producers and importers in competition with the non-licensed producers and importers, commonly referred to as independents, but in point of fact, infringers? A. Yes, sir. The competition is very keen, not to say bitter.

Q. In what respect does that competition show itself particularly? A. You have reference now only to the producers?

Q. Yes, A. It shows itself in competition in the first place for stories that are to be made the basis of motion picture plays. Each producer, whether licensed or so-called independent, is trying to get the best plays he can to put out. The competition is very keen on the subject of actors, and if an actor has been popularized by one company so as to be a valuable acquisition, ridiculous offers are made to get him or her away. Competition has also manifested itself in advertising. Each producer is spending money to popularize his particular make of film. Then, all the producers send traveling men around to interest the exchanges in their films, and try to get the exchanges to buy more of their films. And the same thing is done as at the time of the Edison license, in trying to stir up interest on the part of theatres in certain makes of films. For instance, a producer might feel that his films are not represented as strongly as they should be in a certain territory, and he will send representatives around to interview all the theatres in that territory to try to get the

1 theatres to bring pressure to bear on the exchanges to buy that particular brand of films. Then, the competition, in another sense, is manifested by the fact that if some particular producer finds a very desirable place to operate in, where the conditions are good, generally all of his competitors flock out to the same place and establish themselves there—in other words, the competition is open and active, each producer trying to sell the maximum number of prints of the pictures he makes.

Q. Has there been any tendency in recent years for the non-licensed producers and importers to unite in turning out a program for the exhibiting theatres? A. Oh, yes, that is the only way the business can be handled, at least, under present conditions.

Q. How many groups of these unlicensed producers are there? A. There are two groups. One known as the Mutual, the other the Universal.

Q. Do you know what brands of pictures are turned out by the Mutual? Could you enumerate them from memory? A. I should rather not.

Q. I show you here, a copy of the Moving Picture World of November 1st, 1913, and ask you to refresh your memory by looking at that. A. The Mutual Company is allied with the producers of the following brands, namely, Apollo, Majestic, Tannhäuser, American, Keystone, Reliance, Broncho, Domino, Eclair, and Princess; and also handles a topical weekly called the Mutual Weekly.

Q. Many, if not all of the producers of the pictures, which you have just enumerated, were turning these pictures out two years ago, were they not? A. Yes, sir, as I recall it.

Q. And at the time the petition in this case was filed? A. Yes, sir.

Q. Now, will you enumerate what pictures are turned out by the Universal Company and its allied producers? A. The Universal group includes the following productions: Rex, Crystal, Eclair, Victor, Inup, Powers, 101-Bison, Nestor, Joker, Frontier, and a topical weekly called the Animated Weekly.

Q. What class of pictures are comprised in the Mutual Weekly and the Animated Weekly? A. Pictures of the same general type as the Pathe Weekly handled by the

General Film Company, or, in other words, a weekly or semi-weekly motion picture newspaper. It is a single reel of film composed of short scenes of topical interest, taken all over the world.

Q. Which of these weeklies was the first to make its appearance? A. The Pathe Weekly.

Q. Then, that set the standard, did it not, that was followed by the others? A. Yes, sir; the others copied it.

Q. These alliances which made up these two large groups of non-licensed producers, were a matter of growth, were they not? A. Yes, sir. Growth and development.

Q. Which commenced about the time of the organization of the Patents Company, that is to say, some of the companies producing those pictures sprang up very shortly after the Patents Company was organized? A. About that time, yes, sir.

Q. And they gradually formed themselves into these two large groups of competitors? A. That is correct.

Q. They are competing against each other and against the General Film Company and the licensed producers?

A. Yes, sir, each group is trying to get as much business as it can, and minimize the business obtained by its competitors.

Q. About how many customers are now being served in the United States by the General Film Company? A. In the United States and Canada, about 7,100, as I recall. I think in the United States about 6,000.

Q. Do you know approximately how many theatres are being served by the exchanges handling the Mutual pictures and the Universal pictures? A. To the best of my knowledge, I believe that about the same number are handled by both of those concerns that are handled by our concern, although they claim that they are handling more.

Mr. GOSWORTHY: I want to object to the latter part of that answer, as to what the others claim, as being improper.

Mr. CALDWELL: Before we get through this case, I think we will be able to show with reasonable certainty, how many customers are being served with the non-licensed pictures.

Mr. GOSWORTHY: I have no doubt you can, but it

- 1 should be proved, of course, in the proper way, and not by this witness stating what they claim.

Q. Is the General Film Company in active competition with the exchanges handling the unlicensed pictures? A. Yes, sir. Most active competition.

- Q. Can you state in what way such competition manifests itself? A. One peculiarly irritating way that competition manifests itself is that wherever we get a location for a brunch exchange at a certain place, or a certain building, we find that our competitors try to get in the same location and, if possible, in the same building, and preferably on a lower floor, so as to intercept the customers. The competition between the exchanges manifests itself in the efforts on the part of each to get as much business as possible at the best possible price. Our competitors try to take our customers away from us by offering them better service or more reels, or a better price, and we do the same thing ourselves. All the exchanges are competing by means of travelling men who go around visiting various theatres, and try to interest them in the respective programs of the exchanges that they represent. I think in that respect, the Mutual and Universal Companies are more active than we are. The competition is also manifested by the advertisements of the three concerns, each trying to convince the theatres that it handles the best films, and will give the most satisfactory service. The competition is manifested by the fact that both the Mutual and Universal Companies have for quite a considerable time, been taking a good many of our best men away from us by offering them better inducements as to salary. And in all respects, I think the competition has been as keen and as active as could exist in any line of business. As a matter of fact, there has been no co-operation between the three divergent competitive interests, except possibly in one or two cases where unjust censorship laws have been agitated, where there has been co-operation to a certain extent, but there has not been the co-operation that I think exists and should exist between competitive units in other lines of business. In other words, it seems to me that in matters of common interest, competitors should unite, but that is

By Mr. CALDWELL:

not the case with the three moving picture units referred to.

Q. Suppose the General Film Company undertook to increase the price of service to a given theatre, what would happen? A. Well, if it did that, as sometimes does happen, we find that a theatre is paying less than he ought to pay, paying less than the service is worth—if the theatre is convinced that the service is worth the additional price, he will pay it, the same as in any other line of business, but if the price is not satisfactory, the theatre will get service from one of our competitors. That is happening all the time. We are losing customers to them and they are losing customers to us. There is a constant shifting back and forth all the time.

Q. Would it be possible for the General Film Company to unduly raise the price of service to customers? A. No, sir, it would not. As I stated yesterday, the average profit of the General Film Company is only ten per cent.

Q. Can you state how many pictures are being released at the present time by the licensed producers and importers?

A. In the regular service, about thirty-two single reels, and sixteen multiple reels, making a total of forty-eight, and twelve or thirteen reels in exclusive service, making a total of sixty or sixty-one per week.

Q. Can you state how many pictures are being released weekly by the Mutual group of producers and importers? A. About twenty-six. I think they are working to a production of twenty-eight per week, which would be the equivalent of four per day.

Mr. GROSVENOR: What do you mean by "they are working?" I object to that, on the ground that it is not the proper answer to the question, which was "What is the output of those companies?"

By Mr. CALDWELL:

Q. Can you confine your answer to a statement of the actual conditions? A. About twenty-six to twenty-eight per week.

Mr. GROSVENOR: What does it show on that book that you are referring to as a memorandum?

1 The Witness: It shows that for the week of October 26th, there were twenty-six.

By Mr. CALDWELL:

Q. Does that include the special releases? A. Yes, sir, it includes their entire output.

Q. How many pictures are being released weekly by the Universal group of producers and importers? A. Twenty-eight, or four per day. That is the logical number of releases.

2 Mr. GROSSVONOR: I object to this added answer about the logical number. It is not responsive to the question.

The Witness: By "logical number" I meant it provided a program of four reels per day with a daily change.

By Mr. CALDWELL:

Q. The figure that you gave of twenty-eight, represents the actual number of weekly releases, does it not? A. It does.

3 Mr. GROSSVONOR: How did you make up the twenty-eight on this? Did you consider, wherever the title is named "in three parts" you considered it as three releases?

The Witness: Yes, sir; three reels.

By Mr. CALDWELL:

Q. That is customary in this business, is it not? A. Yes, sir.

4 Q. You counted your own releases the same way? A. In the same way.

Q. Do you know how the prices to the exhibitor, charged by the General Film Company, compare with the prices charged by the exchanges handling the output of those two groups, based upon the same run films? A. On an average, our prices are somewhat higher. The films are considered better and are worth more, but I know of isolated cases where the prices obtained by the other exchanges are higher, because they give exclusive territory in some cases. For in-

stance, I know of a theatre in Atlanta that pays \$180 a week for Mutual service, because that theatre has quite an extensive territory in which the Mutual program is not shown. The price is based upon competitive conditions, and on an average we are able to get better prices than they are.

Q. Has the General Film Company a customer in the City of Atlanta from which it is receiving as high as \$180 a week? A. I don't recall any.

Mr. GROSSVONOR: May I interrupt? When you say you are able to get better prices, you mean you are able to get more from the exhibitor?

The Witness: They are willing to pay us more for our films than they are for their films.

Mr. GROSSVONOR: That is because you have the larger theatres, isn't it?

Mr. CALDWELL: I object to the witness being cross examined at this particular time.

Mr. GROSSVONOR: All right, I will withdraw the question. I mean, I won't insist on an answer. I asked you if I could ask a question.

Mr. CALDWELL: Any question that you want to ask for the purpose of explaining what the witness has said or to correct any misapprehension, is perfectly proper at the present time, but I do not think that you ought to enter into a cross examination of the witness until the direct examination has been concluded.

By Mr. CALDWELL:

Q. Have you seen many of the pictures released by the Mutual group and the Universal group?

Mr. GROSSVONOR: Objected to as immaterial.

A. Why, yes, I run across these pictures every once in a while. I don't see all of them by any means.

Q. They turn out good, superior pictures, do they not? A. Yes, sir, they are improving. They are making very great strides. The pictures are not as good, I don't think,

1 as licensed pictures, but they are very much better than they once were.

Q. Can you state in what localities the General Film Company is maintaining branches today? A. Yes, sir.

Q. Will you state them? A. Bangor, Maine; Boston, Massachusetts; Buffalo, Albany and Syracuse, New York;—

Mr. GROSVENOR: (interrupting): That is already in evidence.

2 Mr. CALDWELL: You have a statement of the branches of the General Film Company which was prepared some time early in 1912, and which you introduced in evidence, which probably gave a correct list of the branch exchanges of the General Film Company as they existed at that time. This, however, has undergone considerable change since that time.

Mr. GROSVENOR: I would like to check that off with my list. Where is the Boston office?

3 The Witness: The two offices have been combined, and we had to move to another location because of the very harsh and oppressive fire laws.

Mr. GROSVENOR: Go ahead. I did not want to interrupt. I was just trying to get my own list accurate.

The Witness: Three offices in New York City. Rochester, and Syracuse.

Mr. GROSVENOR: Syracuse is a new one?

4 The Witness: Three offices in New York City, Philadelphia, Wilkesbarre and Pittsburgh, Pennsylvania—two offices in Pittsburgh; Baltimore, Maryland; Washington, D. C.; Wheeling, West Virginia.

Mr. GROSVENOR: Baltimore is a new office?

The Witness: Yes, sir.

Mr. GROSVENOR: Wheeling is a new one?

The Witness: Yes, sir. Atlanta, Georgia; Jacksonville, Florida. 1

Mr. GROSVENOR: Jacksonville is a new one?

The Witness: Yes, sir. Memphis, Tennessee; New Orleans; Houston—that is a new office; Dallas, Texas; Oklahoma City, St. Louis, Cincinnati, Columbus, Cleveland, Detroit, Indianapolis, Chicago, three offices instead of four. Milwaukee.

Mr. GROSVENOR: Milwaukee is a new office?

The Witness: Milwaukee is new. Minneapolis, Butte. 2

Mr. GROSVENOR: Butte is new?

The Witness: No, Butte is old.

Mr. GROSVENOR: Oh, yes.

The Witness: Omaha, Kansas City, Salt Lake City, Denver, Phoenix. That is a new office. 3

Mr. GROSVENOR: Phoenix is new?

The Witness: Yes. Los Angeles, San Francisco, Portland, Oregon; Seattle, Spokane. St. Johns, New Brunswick, Montreal, Toronto, Winnipeg, Regina—that is a new office; Calgary, a new office, and Vancouver.

By Mr. CALDWELL:

Q. Were any of these new branch offices established, Mr. Dyer, as a result of the competition which you had with the Mutual and Universal exchanges? A. Yes, sir. Established to get into territory that they were working in, and we felt it important that we should get there ourselves. 4

Q. Which you were also serving, however, from some other branch? A. From a remote branch, yes, sir.

Q. Could you state offhand, some of these offices that were established for that purpose? A. Bangor, Maine; Syracuse, New York; Baltimore, Maryland; Wheeling, West-

- 1 Virginia; Jacksonville, Florida; Milwaukee and Phoenix and Calgary. The office at Regina was established simply for the purpose of providing a place where films might be censored in the Province of Saskatchewan, in Canada. The Canadian provinces are very keen about their censorship. They look upon it apparently as a source of revenue.

Mr. GREGG: I do not understand that last sentence. Look upon what?

2 The Witness: Upon the possibilities of censoring films.

By Mr. CALDWELL:

Q. What territory is being served by the Albany office of the General Film Company? A. The Albany office serves customers in the City of Albany and neighboring towns, works up in the northern part of New York State, sends films over into Vermont, the western part of Massachusetts, and works down the Hudson River, about as far as Poughkeepsie.

Q. Now, what competition have you in that territory?

9 A. Have you the list of competing exchanges?

Q. I think you have the list. A. (referring to list): The Universal Company maintains an exchange in Albany, which directly competes with us or directly competes with the Albany office; the Mutual Company maintains a branch in Springfield, Massachusetts, covering part of the Albany territory. Both Mutual and Universal companies maintain branches at Buffalo, which compete with the Albany territory, and both the Universal and Mutual companies maintain offices in New York City, which also compete with the Albany territory. A competing exchange, or rather, an exchange, can effectively serve customers within reasonable express distance.

Mr. CALDWELL: It is now our usual time of adjournment.

The Examiner: We will take an adjournment until 2:30 this afternoon at the same place.

Whereupon, at 12:30 P. M., the hearing is adjourned until 2:30 P. M., at the same place.

NEW YORK CITY, November 12, 1913. 1

The hearings were resumed pursuant to adjournment at 2:30 o'clock P. M., November 12, 1913, at Room 159, Manhattan Hotel, New York City.

The appearances were the same as at the morning session.

Thereupon FRANK L. DYER resumed the stand.

Direct examination continued by Mr. CALDWELL:

Q. What territory is served by the Atlanta branch of the General Film Company? A. The Atlanta branch handles the territory in Georgia, and to a little extent it works down into Florida, also works over into Alabama, and handles some customers in Eastern Tennessee, and works up into South and North Carolina.

Q. Who are your competitors in that territory? A. The Mutual Company maintains an exchange on Walton Street, near our office, and the Universal Company maintains an exchange in the same building that we are in. In addition, the Mutual Company maintains an exchange in Charlotte, N. C., which competes with our Atlanta branch in North and South Carolina.

Q. Do you know the name of the Universal exchange that maintains the branch at Atlanta? A. Mutual Film Corporation.

Q. I mean the Universal? A. Oh, the Universal?

Q. Yes. A. Consolidated Film & Supply Company.

Q. Is that an exchange that is allied with the Universal Company? A. Yes, that handles the so-called Universal program in that territory.

Q. And limits itself to that program? A. Yes, sir.

Q. And does not handle any of the pictures produced by the Mutual group? A. No.

Q. What territory is served by the Baltimore branch of the General Film Company? A. Practically the City of Baltimore alone. There are some exhibitors in Baltimore served from Washington, and I think, also some exhibitors in Baltimore who are served from Philadelphia.

Q. What competitors have you in Baltimore, or in the territory served from your Baltimore branch? A. The Mutual program is handled in Baltimore by the Conti-

1 nental Film Exchange, and the Universal is handled in Baltimore by the Baltimore Film Exchange. Both of these exchanges directly compete with us in Baltimore. In addition, the Universal program is handled in Washington by the Washington Film Exchange, and the Mutual Company has a branch in Washington, which handles their program. The competition with us is direct.

Q. The Continental Film Exchange is one of the several exchanges allied with the Mutual group, and the Baltimore Film Exchange is the name of another exchange allied with the Universal group, each devoting itself exclusively to the handling of films of their respective groups of producers, is that correct? A. Yes.

Q. What territory is served by the Bangor, Maine, branch of the General Film Company? A. That office serves customers in the central part of Maine, down as far south as Portland, but several customers in Portland are served from the Boston office.

Q. And what competitors has the General Film Company in that territory? A. The Universal Company maintains, or rather the Universal program is handled in Boston by the New England Universal Film Exchange, and the Mutual Company maintains a branch in Boston. In addition, the New England Company maintains a branch at Waterville, Me., a short distance southwest of Bangor, and the Waterville office competes direct with our Bangor office. Before putting in the Bangor office, I might say that we debated whether to locate it at Waterville, or Bangor, but we thought that Bangor would be the better place. I do not recall whether the Mutual at that time was in Waterville or not. My impression is that they went to Waterville after we went to Bangor.

Q. What territory is served from the Boston branch of the General Film Company? A. The Boston branch, owing to the proximity of the Charleston Navy Yards, serves quite a number of battleships, which is true of our two competitors. The territory served by the Boston office is Massachusetts, westerly until it overlaps the Albany territory, the southern part of Maine, New Hampshire, Rhode Island, and the eastern part of Connecticut, to where it overlaps the New York territory.

Q. What competition have you in that territory? A. We have a great deal of competition in that territory. The

Mutual Company maintains a branch at Boston, and the Universal films are handled by the New England Universal Film Exchange. In addition, the Universal maintains at Springfield, Mass., a branch of the Universal Film Exchange, of New York. The Mutual Company likewise maintains a branch in Springfield, Mass.

Q. What territory is served from the Buffalo branch of the General Film Company? A. The territory around Buffalo, as far east as Rochester, running south to Binghamton, the northern part of Pennsylvania, and the eastern part of Ohio, and Erie, Pa.

Q. What competition have you in that territory? A. The Mutual Company maintains a branch in Buffalo. In fact, as I recall, the Mutual Company has moved into quarters we formerly occupied before we moved out.

Mr. GROSVENOR: Please mark, Mr. Examiner, for identification, the memorandum which the witness is using.

Mr. CALDWELL: I will offer it in evidence.

Mr. GROSVENOR: I simply wanted it to help me in my cross examination, but if you are going to offer it in evidence, it need not be marked now.

Mr. CALDWELL: Go ahead, Mr. Dyer.

The Witness: The Universal program is distributed in Buffalo from the Victor Film Service. These exchanges cover the same territory as our Buffalo office.

By Mr. CALDWELL:

Q. What territory is served by the Butte, Montana, branch of the General Film Company? A. Principally Montana, Eastern Idaho, and Northern Utah. The territory served by the Butte and Salt Lake City branches is more or less overlapping.

Q. What competition have you in that territory? A. The Mutual Company maintains an office in Butte, Montana, under the name of Pacific Mutual Film Corporation. It also maintains an office at Salt Lake City, both of which compete with our Butte office. The Universal program is distributed from the office in Butte of the William H. Swanston Film Company, and the same concern, under the same

- 1 name, operates an office in Salt Lake City. So that these two competitors are located at the same points that we are, and have the same competitive advantages.

Q. What territory is served by the branch of the General Film Company maintained at Calgary, in the Province of Alberta, Canada? A. The Calgary office serves the rapidly-developing Canadian territory located between Winnipeg and Vancouver, including the important cities of Calgary and Edmonton. That territory extends practically along the line of the Canadian Pacific Railroad.

- 2 Q. And what competition have you in that territory? A. I might say we opened the office at Calgary to take care of that territory because the jump between Winnipeg, or Vancouver, was too big to give effective service. We have competition from the Universal in Calgary, their exchange being called the Canadian Film Exchange; and they also maintain an office under the same name at Edmonton, Alberta. The Mutual Company maintains an office at Calgary, called the Mutual Film Corporation of Canada, and these offices compete directly with us and cover the same territory.

- 3 Q. You have stated that the General Film Company maintains three branch offices in the City of Chicago. What territory is served by these three branches? A. Principally the City of Chicago. These branches also serve customers in the southern part of Wisconsin, in the State of Illinois, and some customers in Iowa.

Q. What competition do you meet with in that territory? A. The Universal program is handled in Chicago by the Anti-Trust Film Company, the Laemmle Film Service Company, and the Standard Film Exchange; and the Mutual Company maintains an office in Chicago under its own name, and its program is also handled by the H. & E. Film Service Company. 4 The Mutual Company also maintains a branch at Des Moines, Iowa, which competes for the Iowa business of the General Film Company. Universal films are also distributed from Des Moines, Iowa, and from the Laemmle Film Service, which likewise competes for the Iowa business with the Chicago branches of the General Film Company.

Q. What territory is served from the Cleveland, Ohio, branch of the General Film Company? A. The territory in and around Cleveland, as far east as Erie, including customers at Toledo, and the northern part of Ohio, not served from Columbus.

Q. And what competition have you in that territory? A. 1 The Mutual Film Company maintains a branch at Cleveland, Ohio, and the Universal program is distributed by the Victor Film Service, of Cleveland, Ohio. The Mutual Company maintains an office at Columbus, Ohio, and the Universal films are distributed from Toledo, Ohio, by a concern called the Toledo Film Exchange Company, and both of these exchanges also compete with the Cleveland branch.

Q. What territory is served from the branch office of the General Film Company, maintained at Columbus, Ohio? A. 2 Practically the City of Columbus, and the territory immediately surrounding it.

Q. What competition have you in that territory? A. The 3 Mutual Company maintains a branch at Columbus, so as to directly compete with us, and also maintains branches at Cincinnati and Cleveland, which can also and do reach the Columbus territory. The Universal film is handled from Cleveland, Toledo, and Cincinnati, which points also include the Columbus territory.

Q. What exchanges handle Universal programs at Cincinnati, Cleveland, and Toledo? A. The Universal.

Q. Of the Universal—yes? A. The Cincinnati Buckeye 3 Film Exchange handles the Universal program at Cincinnati; the Victor Film Service handles the Universal program in Cleveland, and the Toledo Film Exchange Company handles the Universal program in Toledo.

Q. What territory is served from the branch of the General Film Company, maintained at Dallas, Texas? A. The 4 Dallas branch until the formation of the branch at Houston, served the entire State of Texas, and also some towns in Arkansas, and Oklahoma, on the Texas border. Since the formation of the branch at Houston the territory of the Dallas branch is confined to towns in the neighborhood of Dallas, including Fort Worth, and territory south and north of Dallas.

Q. What competition have you in that territory? A. The 5 Mutual Company maintains a branch in Dallas, a block away from our branch, and the Universal film is distributed in Dallas by the Consolidated Film Supply Co. Both the Universal and the Mutual companies maintain branches in Amarillo, Texas, which point I am not familiar with, but it is evidently a railroad center, and probably competes with the Dallas branch. The Mutual Company also maintains a

- 1 branch at Oklahoma City, which competes with the Dallas branch for business in the border cities between Oklahoma and Texas; and the Universal program is handled also from Oklahoma City, by the United Motion Picture Company, which likewise competes in that territory.

Q. What territory is served by the Denver, Colorado, branch of the General Film Company? A. The Denver, Colorado, branch serves customers in Colorado, some, I think, in eastern Utah, and as far north as Cheyenne, Wyoming. It overlaps the territory of the Omaha and Kansas City branches of the east.

- 2 Q. What competition have you in that territory? A. The Mutual Company maintains a branch in Denver, and the Universal films are distributed in Denver by the Wm. H. Swanson Film Company. The Universal Film Company also maintains a branch for the Universal Film & Supply Company at Wichita, Kansas, which covers part of the territory supplied by the Denver office. Both the Universal and Mutual companies maintain branches in El Paso, Texas, which would compete with part of the territory supplied from Denver.

- 3 Q. Do you happen to know whether the Wm. H. Swanson Film Company, which maintains a branch at Denver, Colorado, is conducted by the same William H. Swanson who appeared here as a witness on behalf of the petitioner? A. I don't know whether Mr. Swanson conducts this exchange or not; I don't know the relations between these exchanges and the Universal Company, except that they handle the Universal program on some basis that prevents conflicts. Whether they are owned at all by that company, or operated under some agreement with it, I am not able to state. The same William H. Swanson whom you refer to is the same man who started these exchanges. I know him very well. I know him. I know him. I have met him. Well, I know him very well.

4 Q. What territory is served from the Detroit, Michigan, branch of the General Film Company? A. The territory of Michigan, Grand Rapids, down into Ohio, including some customers, I think, in Toledo.

Q. What competition have you in that territory? A. Very active competition. The Mutual Company maintains a branch in Detroit, and the Universal program is distributed by the Detroit Universal Film Company, in

Detroit. The Universal Company also maintains a branch at Grand Rapids, and, as I have stated, a branch, or rather its film is distributed from Toledo, by the Toledo Film Company. The Mutual Company also maintains a branch at Grand Rapids, so that in this particular territory each of our competitors has two branches to our one.

Q. What territory is served from the branch of the General Film Company maintained at Houston, Texas?

A. The Houston branch serves territory on the M. K. & T. Railroad, as far north as Waco, also Galveston, and towns on the Southern Pacific Railroad to the Louisiana line on the northeast, including Newmont, and El Paso.

2 Q. What competition have you in that territory? A. The Denver branch of the General Film Company, I might state, was started by the receiver, and not by the company. The Mutual Company maintains a branch at El Paso, Texas. It also maintains a branch at New Orleans, La., and at Amarillo, Texas. I don't know where Amarillo is, so that I am not able to state of my own knowledge what the territory is that it serves. The Universal Company also maintains an office at Amarillo, which apparently is a good distributing point; and there are two offices in El Paso handling the Universal program, namely, the Consolidated Film Supply Co., and the William H. Swanson Film Company. The Universal Company also maintains an office, or its films are distributed from New Orleans, by the Consolidated Film Supply Company. Neither of our competitors appears to have an office at the present time in the City of Houston.

3 Q. But the territory which is served from your Houston branch is served by your competitors? A. Oh, yes; they have customers there, and it was only recently that we opened it, or the receiver opened up the Houston office.

4 Q. What territory is served from the Indianapolis branch of the General Film Company? A. The State of Indiana, northern Kentucky, western Ohio, and eastern Illinois.

Q. What competition have you in that territory? A. The Mutual Company maintains offices in Cincinnati, Columbus, Evansville, and the Chicago offices would also cover the upper part of Indiana, on the Pennsylvania and Lake Shore Roads. The Universal program is distributed from Indianapolis by the Central Film Service Com-

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of the Mutual and Universal programs in New Orleans,

- 1 working north, would also cover the territory handled by the Memphis branch.

Q. What territory is served from the branch of the General Film Company maintained at Milwaukee, Wisconsin? A. Principally the City of Milwaukee, and northern Wisconsin, extending as far west as the territory included in the Indianapolis office, and keeping north of the territory covered by the three Chicago offices.

- Q. What competition have you in that territory? A. The Mutual program in Milwaukee is distributed by the Western Film Exchange, and the Universal program is distributed into this territory from its Chicago office. The Milwaukee office of the General Film Company is quite close to the Chicago office, and while not considered strictly necessary, it was desirable to cover customers in the northern part of Wisconsin. The same territory would be covered by the Universal program by their Chicago offices, working northward, and their Minneapolis office working east.

- Q. What territory is served from the Minneapolis, Minnesota, branch of the General Film Company? A. The State of Minnesota, the eastern part of the Dakotas, and the northern part of Iowa, and some customers in the eastern part of Wisconsin.

- Q. What competition have you in that territory? A. The Mutual Company maintains a branch at Minneapolis, and the Universal program is distributed from Minneapolis by the Laemmle Film Service. In addition, the Universal program is distributed from Des Moines, so as to cover the State of Ohio, which we have to cover from Minneapolis and Chicago, and the Mutual Company maintains a branch at Des Moines which serves the same function for their program. In other words, both the Mutual and Universal companies cover the State of Iowa more effectively than we do.

- Q. What territory is served from the Montreal, Canada, branch of the General Film Company? A. The Province of Ontario, including Ottawa, and working down the St. Lawrence River to include Quebec, but not including New Brunswick or Nova Scotia.

Q. What competition have you in that territory? A. The Mutual Company maintains a branch in Montreal, the Mutual Film Corporation of Canada, and the Universal program is distributed by the Canadian Film Exchange from Montreal. These offices cover the same territory as our branch. The

territory covered by the Montreal office practically extends parallel to the St. Lawrence River and south of the St. Lawrence.

Q. What territory is served from the New Orleans, Louisiana, branch of the General Film Company? A. The territory of Louisiana, working northwardly into Shreveport, running west into Oklahoma, and with the approval of the receiver in Texas, including some cities in the northeastern part of Texas. This office also serves Mobile and other towns in Alabama and Mississippi. Perhaps I should explain that the territories covered by these branches in almost every case follow the lines of the railroads and rivers; lines of travel.

Q. What competition have you in the Louisiana territory or in the territory served from the New Orleans branch? A. The Mutual Company maintains an office in New Orleans, so as to directly compete with us, and the Universal program is distributed by the Consolidated Film & Supply Company at New Orleans, which also competes directly with us. The Dallas and Oklahoma City offices of our competitors cover a portion of the territory also of the New Orleans branch. This territory, for the most part, contains very small theatres, although there are some large theatres in New Orleans.

Q. I think you have testified that the General Film Company maintains at the present time three branches in the City of New York; is that correct? A. Yes, sir.

Q. At one time a greater number of branches were maintained in New York City? At one time you had five branches in the City of New York? A. Yes, sir.

Q. What became of the branches of the General Film Company at one time maintained in New York City that are not now maintained? A. Early in the present year, we consolidated four of these branches, and located them in two new offices, one office at the corner of 23rd Street and Sixth Avenue, and the other office at the corner of Fourth Avenue and 84th Street, so that we are at the present time maintaining these two large exchanges, and also the Peoples Exchange or Peoples Branch, on 42nd Street.

Q. Why did you consolidate those branches?

Mr. GROSSBORO: Objected to as immaterial.

The Witness: Well, that was done before I became Pres-

- 1 ident of the General Film Company, and I do not recall exactly why it was.

By Mr. CALDWELL:

- Q. Were the questions of economy and greater efficiency in distribution—were they factors, or of convenience?

Mr. GROSVENOR: I object to that on the ground that the witness has stated he does not know, and the question is leading.

- 2 A. I think the principal reason was that the quarters where these former branches were located were cramped and small, and dangerous in case of fire. Of course, the consolidation of the branches would result in economy of the service.

- Q. Without impairing the efficiency of the service to the exhibitor? A. Why, it actually would improve the efficiency of the service.

- 3 Q. Will you state what territory is served from the three branches of the General Film Company maintained in the City of New York? A. Greater New York, Long Island, Western, Connecticut, including Bridgeport and Waterbury, up the Hudson River as far as Poughkeepsie; Newark, New Jersey, and the northern towns in New Jersey.

Q. Including Jersey City and Hoboken? A. Yes, sir.

- Q. What competition are you met with in that territory? A. The main office of the Mutual Company in New York City is located in the same building that our 23rd Street branch is located in, although below us.

- 4 Q. That is 71 West 23rd Street? A. Yes, sir. They also maintain a branch at 145 West 45th Street. The Universal program is handled by two branches of the Universal Film Exchange on East 14th Street, and 1000 Broadway. Those branches compete directly with us in this territory. The Universal program is also distributed by the Royal Film Exchange of Newark, so that there is a better distribution of the Universal program in this respect. The Springfield branch of the Mutual Company and of the Universal Company also compete in the territory in Connecticut, which we cover from New York.

Q. What territory is served from the Oklahoma City,

Oklahoma, branch of the General Film Company? A. That is a small branch, covering the territory of Oklahoma, which is at present going through a period of hard times through over-development. It includes also some towns in the northern part of Texas, and some customers, as I recall, in Arkansas and Indian Territory.

Q. And what competition have you in that territory? A. The Universal program is distributed by the United Motion Picture Company of Oklahoma City, which competes directly with us in that territory, and the Mutual Company maintains a branch at Oklahoma City. The two competitors in respect to this office, have an advantage over us because our Oklahoma office is not allowed to work down into Texas, and our Dallas office does not work up to Oklahoma City, but they have no restrictions of their field of operation.

Q. What territory is served from the Omaha, Nebraska, branch of the General Film Company? A. The State of Nebraska, running westwardly of the territory covered by the Denver office, and customers in Iowa up to the territory covered by the Minneapolis office and working downwards. Also customers to the south where the territory of the Kansas City office is encountered.

Q. And what competition have you in the territory served from the Omaha branch? A. The Mutual Company maintains a branch at Omaha, and the Universal program is handled by the Laemmle Film Service of Omaha. These two concerns, as I have before stated, maintain offices in Iowa, or have exchanges for the distribution of their programs in Iowa, and therefore cover the Iowa territory direct, whereas we have to cover it from the Omaha office.

Q. What territory is served from the Phoenix, Arizona, branch of the General Film Company? A. That is a very small, unimportant office, and I do not know very much about it, except that it covers a limited territory in Arizona, principally on the railroad lines from El Paso to Los Angeles.

Q. And what competition have you in that territory? A. The Universal program is handled by the California Film Exchange, which is located directly in Phoenix, and also from Los Angeles and El Paso, as I have before explained. The Mutual Company maintains a branch in El Paso, Texas, and also a branch in Los Angeles, so that these two offices between them cover the same territory.

1 Q. What territory is served from the Philadelphia branch of the General Film Company? A. The Philadelphia branch is a large and active branch, serving customers in Philadelphia, in southern New Jersey, including Trenton and Atlantic City and the summer resorts on the Jersey coast. It also serves customers in Delaware, down the eastern shore of Maryland. It works westerly towards Harrisburg, and northerly towards the Wilkesbarre office. The Philadelphia office also has some customers that are served by it as far south as Richmond, Virginia.

2 Q. What competition have you in the territory served from the Philadelphia branch? A. The Mutual maintains a branch in Philadelphia, and the program is also handled by the Continental Film Exchange of Philadelphia, and it also maintains a branch at Harrisburg, Pennsylvania.

3 Q. Doesn't the Mutual maintain two branches in Philadelphia? A. I said that. One is the Mutual Film Company and the other is the Continental Film Exchange. The Mutual program is also distributed from Wilkesbarre, Pennsylvania, and the Western Film Exchange. Also, in Baltimore, Maryland, as I have before stated. The Universal maintains three offices, or rather its films are distributed from three offices in Pennsylvania, the Eagle Projection Company, Interstate Film Company, and the Philadelphia Film Exchange. The Universal program is also distributed from Harrisburg, from Wilkesbarre, and from Baltimore, so that our competitors are directly in the same territory as ourselves.

Q. You have stated that the General Film Company maintains two branches in the City of Pittsburgh, Pennsylvania, have you not? A. Yes, sir.

4 Q. What territory is served from those two branches? A. The western part of Pennsylvania up into New York State to the territory covered by the Buffalo office, westerly into Ohio, including Youngstown. And down in West Virginia. I think the Pittsburgh offices also serve some customers in western Maryland.

Q. And what competition have you in the territory served from your two Pittsburgh branches? A. The Universal program is distributed in Pittsburgh by the Pittsburgh Photoplay Company, and the Universal program is distributed in Pittsburgh by the Independent Film Exchange, both of which concerns compete directly with our Pittsburgh branches. In

1 addition, the Harrisburg, Buffalo, Cleveland, Columbus and Cincinnati offices of our competitors would work into the territory covered by the Pittsburgh offices of the General Film Company.

Q. What territory is served by the Portland, Oregon, branch of the General Film Company? A. Principally the State of Oregon, the northern part of California out of the reach of the San Francisco office, the southern part of the State of Washington below the Seattle office.

2 Q. What competition has the General Film Company in that territory? A. The Mutual Company maintains a branch at Portland, Oregon, and the Universal program is distributed by the Film Supply Company, also located at Portland, Oregon, so that these offices compete directly with us. Our competitors also maintain branches, as we do, in Seattle, Spokane, and San Francisco, so as to cover this territory in addition to the Portland offices.

3 Q. What territory is served from the Regina branch of the General Film Company? That is in the Province of Saskatchewan. A. The Regina office was largely formed for the purpose of providing for the censorship of films in that province. That is a very recent office, so that I am not able to state of my own knowledge, the territory which it covers, except that, as we all know, it is located between Winnipeg and Calgary and covers this intermediate territory. Most of the information I have been giving regarding our office is based on my own personal observations, or from the direct reports to me from the managers.

4 Q. Do you know what competition you have in the territory in which Regina is located? A. The Canadian Film Exchange handles the Universal program in Regina, and it also maintains branches in Saskatoon and Calgary, so as to cover this western Canadian territory—and the Mutual Company maintains a branch in Regina, and also one in Calgary, to cover the same territory. This territory, as I said, is practically limited to the great trans-continental railroads running across Canada, and does not extend north and south, but almost always east and west.

Q. What territory is served from the Rochester, New York, branch of the General Film Company? A. Almost exclusively the territory of Rochester. This is a small branch. The territory could almost as well be handled from Buffalo.

- 1 Q. What competition do you find there? A. Neither of our competitors is located at Rochester, but the Mutual Company maintains a branch in Buffalo, and the Universal program is distributed by the Victor Film Service of Buffalo. The Universal office at Albany also occupies a competitive relation to our Rochester office. This is not an important point, and it is not unlikely that the office will be closed.

- 2 Q. What territory is served from the St. Louis, Missouri, branch of the General Film Company? A. The St. Louis branch is an important, large branch, serving the territory around St. Louis, Eastern Missouri, into the territory covered by Kansas City, southerly into Arkansas, including also, Kentucky, and southwesterly Illinois, and a part of Iowa.

- 3 Q. And what competition have you in that territory? A. The Mutual Company maintains a branch in St. Louis, and the Universal Company also maintains a branch in St. Louis, so that these concerns compete directly with us. Both of our competitors also maintain branches in Kansas City, Des Moines, and other places that compete into the territory covered by our St. Louis office.

- 3 Q. What territory is served from the Salt Lake City, Utah, branch of the General Film Company? A. This is not a very important branch, because the territory in Utah is very sparsely settled, and the principal business is at Salt Lake City. The branch, however, serves customers as far north as Montana and co-operates to a certain extent with the Butte office, which serves customers also westerly towards Portland, and southeasterly towards Denver. The Salt Lake City office is not very important, and the territory is not particularly good.

- 4 Q. What competition have you in that territory? A. The Mutual Company maintains a branch at Salt Lake City, and the Universal program is distributed by the William H. Swenson Film Company of Salt Lake City, so that our two competitors are competing directly with us in that territory.

Q. What territory is served from the San Francisco, California, branch of the General Film Company? A. This is also a very important branch. It includes the city and adjacent country around San Francisco, working west into the State to Stockton, and working southerly towards the

Los Angeles territory, and northerly towards the territory covered by the Portland, Oregon, office.

Q. And what competition have you in that territory?

A. The Mutual Company maintains a branch in San Francisco.

Q. Under what name? A. Under the name of the Pacific Mutual Film Corporation. And the Universal program is distributed in San Francisco by the California Film Exchange. Here, again, our competitors surround us, on the north by offices in Portland, and on the south by offices in Los Angeles, on the east, by offices in Salt Lake City, so as to cover the territory of the San Francisco office.

3 Q. What territory is served from the Seattle, Washington, branch of the General Film Company? A. Practically the State of Washington, as far north as the Canadian border, working westerly towards the territory covered by the Spokane office, and down into Wisconsin into the territory covered by the Portland, Oregon, office. Seattle also serves customers in Alaska.

3 Q. And what competition have you in the territory served from your Seattle office? A. The Mutual Company maintains a branch at Seattle, and the Universal program is distributed by the Film Supply Company of Seattle. Both of our competitors are, therefore, located in the same central city that we are, in this territory, and in addition, have branches or distributing points in Spokane and Portland. I notice that the Mutual maintains a branch at Sioux Falls, South Dakota, which gives them better distribution in the territory between our Butte and Minneapolis offices. We have no office at that point.

4 Q. What territory is served from the Spokane, Washington, branch of the General Film Company? A. The Spokane, Washington, branch serves the territory in the western part of Washington, not covered by Seattle, into Idaho, and the westerly part of Montana, also down into northwesterly Wyoming, and northern Utah. This is a territory of a few scattered towns and not very large the areas.

Q. Did you mention both the Mutual and the Universal companies in connection with your Spokane branch? A. The Mutual Company maintains a branch in Spokane, and the Universal program is distributed by the Film Supply

- 1 Company of Spokane, so that they are located in the same city that we are.

Q. What territory is served from the St. Johns, New Brunswick, branch of the General Film Company? A. This branch serves the territory of New Brunswick and Nova Scotia, including the important towns of Halifax and Prince Edward Island.

- Q. And what competition have you in that territory? A. The Mutual Company maintains a branch at St. Johns, the Mutual Film Corporation of Canada; and the Universal Company appears to have no distributing office at St. Johns, its nearest distributing point being at Montreal. This territory is not very important, except for the two cities of St. Johns and Halifax.

Q. What territory is served from the Syracuse, New York, branch of the General Film Company? A. The Syracuse branch is very similar to the Rochester branch, and is quite unimportant. It serves principally the City of Syracuse, and its immediate neighborhood, including, I think, Utica. But its territory could be handled about as effectively from Buffalo and Albany, and it is not improbable that this office may also be closed.

- Q. What competition have you in the territory served from the Syracuse office? A. Principally from the Buffalo and Albany offices of our competitors.

Q. What territory is served from the Toronto, Canada, branch of the General Film Company? A. That branch serves the territory principally of the City of Toronto, which is a very large, flourishing place, also in Ontario, easterly towards Montreal and Ottawa, and westerly towards Winnipeg on the line of the Canadian Pacific and Grand Trunk Railroads. It serves the towns also on the Canadian shores of the Great Lakes.

- Q. And with what competition are you met in that territory? A. The Mutual Company maintains a branch in Toronto, so as to compete directly with us, and the Universal program is distributed by the Canadian Film Exchange, which is also located in Toronto. Both the Mutual and Universal programs are distributed also from Winnipeg, so as to work easterly towards the territory covered by the Toronto branch.

Q. What territory is served from the Washington, Dis-

trict of Columbia, branch of the General Film Company? A. Principally Washington, D. C., and including also customers in Baltimore, the westerly shore of Maryland, up into Maryland towards the Pennsylvania line, westerly towards Hagastown, so as to meet the territory of the Pittsburg offices, and southerly into Virginia and North Carolina. The Washington office also serves some customers, I think, in West Virginia towns. I recall Grafton, particularly, Grafton, West Virginia.

Q. And with what competition are you met in the territory served from your Washington branch? A. The Mutual Company maintains a branch in Washington, and the Universal program is distributed in Washington by the Washington Film Exchange, so that our competitors are located directly at the same center of distribution as ourselves. In addition, the Mutual Film Corporation maintains a branch at Charlotte, North Carolina, so as to cover the territory midway between the Washington and Atlanta branch of the General Film Company, and the Universal program, is also distributed in Charlotte by the Interstate Films Company, so as to cover this intermediate territory.

Q. What territory is served by the Wheeling, West Virginia, branch of the General Film Company? A. A very limited territory, including the immediate neighborhood of Wheeling, some towns in the eastern part of Ohio, like Belaire and Martin's Ferry, and some of the mining towns in northwestern West Virginia.

Q. And what competition do you have in that territory? A. The Mutual Company maintains a branch in Wheeling, so as to compete directly with us, and the Universal Company also maintains a branch in Wheeling, so as to likewise compete directly with us in that rather limited territory.

Q. What territory is served from the Wilkesbarre, Pennsylvania, branch of the General Film Company? A. This branch serves the territory principally in the immediate neighborhood of Wilkesbarre, including Scranton, works down towards the Philadelphia offices, and westwardly into western New Jersey. It also serves some customers in southern New York, such as Binghamton, and therefore approaches the territory of the Buffalo and Rochester offices. It works westerly on the northern part of Pennsylvania towards the Pittsburg territory.

1 Q. What competition do you find in the territory served from your Wilkesbarre branch? A. There is a Mutual exchange in Wilkesbarre called the Western Film Exchange, which appears to be located a few doors away from our branch, and the Universal films are distributed in Wilkesbarre by the Exhibitors' Film Exchange, which is located in the same building as the Mutual Exchange, so that these two exchanges therefore compete directly with our Wilkesbarre branch.

2 Q. What territory is served from the Winnipeg, Canada, branch of the General Film Company? A. The important territory around Winnipeg running westerly towards Calgary and Regina and easterly on the railroads towards Toronto, a territory that is very large in area, but not very thickly populated. Also, some of the growing cities on the northern shore of Lake Superior.

3 Q. And what competition are you met with in that territory? A. The Mutual Company maintains a branch at Winnipeg, the Mutual Film Corporation of Canada and the Universal program, as is the case with all Canadian branches, is distributed in Canada by the Canadian Film Exchange, whose branch is located in Winnipeg, so that these two exchanges therefore compete directly with us on questions of service.

4 Q. What territory is served by the branch of the General Film Company maintained in Vancouver, Canada? A. The territory in and around Vancouver, working westerly towards Calgary and Edmonton. I am not sure, but I think that part of the Alaska business is also handled from Vancouver.

5 Q. And what competition do you find in that territory? I don't mean Alaska, the last territory referred to, but the territory served from that branch. A. The Mutual Company maintains a branch at Vancouver, and the Universal films are distributed by the branch of the Canadian Film Exchange at Vancouver. I might say that the Canadian Film Exchange in Canada maintain offices at Edmonton and Saskatoon, where the General Film Company is not located.

6 Q. Is there a point anywhere in the United States and Canada where you are not met with competition by one or both of these exchanges, or exchanges allied with one or the other, or both of these two groups of producers? A. No, there is not. As a matter of fact, with the exception

of Bangor, Jacksonville, Rochester and Syracuse, every point where we have a distributing office, also contains an office of one or the other or both of our competitors, and generally both of our competitors, and these few exceptions are territories that are just as effectively or almost as effectively covered by our competitors from adjoining towns. On the other hand, our competitors are located at a good many points where we have no branches, and where it is not always easy to meet competitive conditions of service. For instance, their offices in Charlotte, North Carolina, are important distributing points where we are not located. Their offices in Tampa, Florida, are important points, although, for all practical purposes, we try to cover this territory from Jacksonville. Their offices in El Paso are very important distributing points which we could not reach from Houston probably inside of forty-eight hours. The office of the Mutual at Sioux Falls is also an important distributing point, which directly reaches territory that we cannot effectively cover from Butte, Salt Lake, Omaha or Minneapolis, and the offices of our competitors at Springfield, Massachusetts, are important distributing points in very thickly populated sections of the country. The towns, such as Springfield, Holyoke, Worcester, Greenfield and Hartford being within very close striking distance.

Mr. GOSWORTHY: Well, you furnish theatres in all the towns you have named, don't you, with films?

The Witness: We furnish the theatres in those towns, but I am trying to point out that by reason of the larger number of offices that they have, our competitors can furnish them more easily than we can. The offices of the Mutual in Evansville, Indiana, and of the Universal in Louisville, Kentucky, also cover territory that we cannot reach so effectively from our Memphis, Cincinnati and Indianapolis branches. On the whole, I should say that, so far as competitive conditions are concerned, the Universal and Mutual are more advantageously placed to give service quickly than we are, and that the absence on our part of enough distributing offices is something of a handicap.

1 By Mr. CALDWELL:

Q. And how do you find this competition, Mr. Dyer—is it active, keen, vigorous, and hostile? A. Yes, sir; it is very active and very keen, and more or less bitter. The business is a new business, and I might say that it has not become thoroughly civilized. There is not the feeling of courtesy and good will that ought to exist between competitors. The feeling seems to be, on the part of exchange managers, one of personal hostility towards anyone who is connected with a competing exchange. The effort in each case is to try to get all the business that can be gotten.

2 Our competitors make frantic efforts to take our customers away from us by offering them more reels, or reels of newer age, or better service, or special features, or free posters, or agree to pay express charges both ways, or they make a better price, in order to get the business, and, of course, we try to do the same thing ourselves. It is exactly the same as any other business where competition enters. The factors are fighting for all they can get, and they are fighting for the best prices that they can get, and in a good many sections of the country, I know of my own personal knowledge, that our competitors are making more active efforts than we are, to get our customers away from us, than we are from them. For instance, I know that in the Boston office, the Mutual Company is now traveling six men, who are going through New England for the purpose of trying to alienate and get customers away from the General Film Company. These are competitive methods. These are the methods that are adopted in any business, particularly in the business that is developing, and a business that is in its infancy, where conditions of stability have not probably at yet, been reached.

4 Q. Are the Universal and Mutual Company continually getting customers away from the General Film Company? A. Oh, yes. That is a fact, that customers are going back and forth from one concern to the other constantly and repeatedly.

Q. And you are constantly getting their customers? A. We are getting their customers, and they are getting ours. Of course, we have some customers who have been with us a long time, and who seem to be entirely satisfied with our films and our program, and their patrons prefer our

films and have taken an interest in the popular actors that we put out, and they have stayed with us, but a large number of theatres are shifting around all the time. They will first try the General Film program, and then they will get sick of that, and then they will try the Mutual program, and get tired of that, and then try the Universal program and give that up, and then come around to the General Film program again, and it will be one round from one exchange to the other, constantly changing from week to week.

Q. So that there are three distinct programs that are being supplied to the motion picture theatres throughout the United States and Canada, is that correct? A. Three distinct regular programs.

Q. One program supplied by the so-called licensed producers and importers, licensed by the Motion Picture Patents Company, the defendants in this case? A. Yes.

Q. A program supplied by the Universal Company, which is comprised of ten or more well known makes of films—and a third program supplied by the Mutual, which is still a third group of producers? A. I don't know what the relationship is between the producers of these programs and the distributors, but it is a fact that there are three competing programs being distributed at the present time in active competition in the United States. First, the General Film program; second, the Mutual program; and third, the Universal program. And it is the effort of these three competing companies to get as many theatres as they can to use their particular programs, and to pay the highest price for these programs that they can get.

Q. And the Universal exchanges will not supply to their customers, pictures that are handled by the Mutual exchanges, and vice versa, is that correct? A. That is correct.

Q. They confine themselves— A. (interrupting): They confine themselves to their own pictures. Their own brands, making a complete program in every case, so that their customers can get the particular variety of service that they contract for.

Q. And that is a trade custom or necessity in the business that has developed?

Mr. GROSVENOR: I object to that as not clear.

- 1 A. It undoubtedly is the result of evolution, and that evolution is the growth toward greater and greater complexity, from the very simple fundamental germ of a single reel that the theatre did not select, but took merely as a parently developed from that germ until, at the present time, instead of giving one reel to a theatre, we are able to give them three or four reels every day, and change as often as they want to, from once to seven times a week. I might say that the thing is getting so absurd in the way of this constant shifting of program, that we actually have cases where a theatre changes a program twice in one day.

Mr. CALDWELL: As a matter of convenience, I offer in evidence a list of the branches maintained by the General Film Company at the present time.
Mr. GROSVENOR: Will this be identified by the witness?

By Mr. CALDWELL:

- 8 Q. Will you identify it? Is that a correct statement of the branches of the General Film Company maintained today? A. I am certain it is correct as far as the cities are concerned, but I don't remember the street address of all of our branches.

The paper offered is received in evidence and marked Defendants' Exhibit No. 108, and is as follows:

Defendants' Exhibit No. 108. E. H.

November 10th, 1913.

GENERAL FILM COMPANY BRANCHES.

Albany, N. Y., 741 Broadway.
Atlanta, Ga., Rhodes Bldg. Annex.
Baltimore, Md., 329 W. Pratt St.
Bangor, Me., 123 Franklin St.
Boston, Mass., 218 Commercial St.
Buffalo, N. Y., 122 Pearl St.

Butte, Montana, 50 E. Broadway.
Calgary, Alberta, Canada, 88 McDougall Bldg.
Chicago, Ill. (Wabash), 17-19 S. Wabash Ave.
Chicago, Ill. (City Hall), 139 N. Clark St.
Chicago, Ill. (American), 429 S. Wabash Ave.
Cincinnati, Ohio, S. E. Cor. 7th & Walnut Sts.
Cleveland, Ohio, 1022 Superior Ave., N. E.
Columbus, Ohio, 26 W. Naghten St.
Dallas, Texas, 1917 Main St.
Denver, Colo., 1448 Champa St.
Detroit, Mich., 71 Griswold St.
Houston, Texas, 807 Franklin St.
Indianapolis, Ind., 24 W. Washington St.
Jacksonville, Fla., 335 St. James Bldg.
Kansas City, Mo., 921 Walnut St.
Los Angeles, Cal., 727 S. Main St.
Memphis, Tenn., Lotus Bldg.
Milwaukee, Wis., 229 W. Water St.
Minneapolis, Minn., 909 Hennepin Ave.
Montreal, Canada, 243 Bleury St.
New Orleans, La., 840 Union St.
New York City (4th Ave.), 440 Fourth Ave.
New York City (23rd St.), 71 West 23rd St.
New York City (Peoples), 260 West 42nd St.
Oklahoma City, Okla., 211 West Second St.
Omaha, Neb., 208 S. 14th St.
Phoenix, Ariz., 446 W. Washington St.
Philadelphia, Pa., 1308 Vine St.
Pittsburgh, Pa. (Caldwell), 110 Fourth Ave.
Pittsburgh, Pa. (Columbia), 436 Fourth Ave.
Portland, Ore., 68 Broadway.
Regina, Sask., McIvor Bk. Rose & S. Railway Sts.
Rochester, N. Y., 501 Central Bldg., 158 E. Main St.
St. Louis, Mo., 604 Chestnut St.
Salt Lake City, Utah, 200 Floral Ave.
San Francisco, Cal., 138 Eddy St.
Seattle, Wash., 519 Third Ave.
Spokane, Wash., 120 Wall St.
St. John, N. B., Canada, 122 Gorman St.
Syracuse, N. Y., Hippodrome Bldg.
Toronto, Canada, 7 Front St. E.
Washington, D. C., Bank of Commerce & Savings Bldg.

- 1 Wheeling, W. Va., 1141 East Side Chapline St.
Wilkes-Barre, Pa., 47 S. Pennsylvania Ave.
Winnipeg, Man., Canada, 220 Phoenix Bldg.
Vancouver, B. C., Canada, 440 Pender St., W.

By Mr. CALDWELL:

Q. Have you prepared a statement of the exchanges maintained by the Mutual Company? A. Yes, sir.

- 2 Mr. GROSVENOR: Is this one of the sheets you have been using when you testified?

The Witness: Yes, sir.

Mr. CALDWELL: I offer it in evidence.

The paper offered is received in evidence and marked Defendants' Exhibit No. 109, and is as follows:

- 3 **Defendants' Exhibit No. 109. E. H.**

MUTUAL EXCHANGES.

- Amarillo, Tex., Mutual Film Corporation, 304 East 4th St.
Atlanta, Ga., Mutual Film Corporation, 61 Walton St.
Baltimore, Md., Continental Film Exchange, 28 W. Lexington St.
Boston, Mass., Mutual Film Corporation, 1106 Boylston St.
4 Buffalo, N. Y., Mutual Film Corporation, 272 Washington St.
Butte, Mont., Pacific Mutual Film Corporation, Illinois Bldg.
Calgary, Alberta, M. F. C. of Canada, Linham Block.
Charlotte, N. C., Mutual Film Corporation, Conn. Nat. Bank Bldg.
Chicago, Ill., The Mutual Film Company, 5 So. Wabash Ave.
Chicago, Ill., H. & H. Film Service Co., 117 N. Dearborn St.

- Cincinnati, Ohio, The Mutual Film Company, 17 Opera Place.
Cleveland, Ohio, The Mutual Film Company, 108 Prospect Ave. S. E.
Columbus, Ohio, The Mutual Film Company, 422 N. High St.
Dallas, Texas, Mutual Film Corporation, 1907 Main St.
Denver, Colo., Mutual Film Corporation, 21 Iron Bldg.
Des Moines, Iowa, Mutual Film Corporation, Cohen Bldg.
Detroit, Mich., Mutual Film Corporation, 97 Woodward Ave.
El Paso, Texas, Mutual Film Corporation, 524 Trust Bldg.
Evansville, Ind., Mutual Film Corporation, Keene Bldg.
Grand Rapids, Mich., Mutual Film Corporation, 7-8 Hawkins Bldg.
Harrisburg, Penna., Mutual Film Corporation, Willoughby Bldg.
Kansas City, Mo., Mutual Film Corporation, Empress Theatre Bldg.
Los Angeles, Cal., Pacific Mutual Film Corporation, 541 W. 8th St.
Memphis, Tenn., Mutual Film Corporation, Kallahan Bldg. 5th Fl.
Milwaukee, Wis., Western Film Exchange, 507 Enterprise Bldg.
Minneapolis, Minn., Mutual Film Corporation, 440-445 Temple Court.
Montreal, P. Q., M. F. C. of Canada, 154 St. Catherine St.
New Orleans, La., Mutual Film Corporation, 346 Carondelet St.
New York City, Mutual Film Corporation, 71 West 23rd St.
New York City, Western Film Ex. of N. Y., 145 W. 48th St.
Oklahoma City, Okla., Mutual Film Corporation, 25 Hudson St.
Omaha, Neb., Mutual Film Corporation, 1417 Farnam St.
Philadelphia, Pa., Continental Film Exchange, 902 Filbert St. 4th Fl.
Philadelphia, Pa., Mutual Film Corporation, 902 Filbert St. 3rd Fl.

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- 1 Portland, Ore., Mutual Film Corporation, 72 Broadway St.
Regina, Sask., Can., M. F. C. of Canada, 312 Westman Chambers.
Salt Lake City, Utah, Mutual Film Corporation, 15 McIntyre Bldg.
San Francisco, Cal., Pacific Mutual Film Corporation, 162-64 Turk St.
St. John, N. B., M. F. C. of Canada, Waterloo St.
St. Louis, Mo., M. F. C., Belmont Bldg., 9th & Pine Sts.
Seattle, Wash., Mutual Film Corporation, 1929 Second Ave.
2 Sioux Falls, S. D., Mutual Film Corporation, Y. M. C. A. Bldg.
Spokane, Wash., Mutual Film Corporation, 408 First Ave.
Springfield, Mass., Mutual Film Exchange, 179 Dwight St.
Tampa, Fla., Mutual Film Corporation, 405 Carry Bldg.
Toronto, Ont., M. F. C. of Canada, 5-6 Queen St.
Vancouver, B. C., M. F. C. of Canada, 329 Carrall St.
Washington, D. C., Mutual Film Corporation, 428 Ninth St. N. W.
3 Waterville, Me., Mutual Film Corporation, Edith Bldg.
Wheeling, W. Va., Mutual Film Company, 1592 Market St.
Wilkesbarre, Pa., Western Film Exchange, 61 S. Pennsylvania Ave.
Winnipeg, Manitoba, M. F. C. of Canada, Aikens Bk., McDermott Ave.

OTHER EXCHANGES USING THE MUTUAL PROGRAM.

- 4 Pittsburgh, Pa., Pittsburgh Photoplay Co., 412 Ferry St.

By Mr. CALDWELL:

Q. Have you had a similar statement prepared of the branches maintained by the Universal Company and its allied exchanges? A. Yes, sir.

Q. Is that the statement that you have just produced? A. Yes, sir.

FRANK L. DYER, DIRECT EXAMINATION. 1695

Mr. GROSVENOR: Is this the statement you have been using in your examination?

The Witness: Yes, sir.

Mr. CALDWELL: I offer it in evidence.

The paper offered is received in evidence and marked Defendants' Exhibit No. 110, and is as follows:

Defendants' Exhibit No. 110. E. H.

DISTRIBUTING OFFICES HANDLING UNIVERSAL SERVICE IN UNITED STATES AND CANADA.

ARIZ., Phoenix, California Film Exchange, Lewis Bldg.
ARK., Ft. Smith, Universal Film & Supply Co.
CAL., San Francisco, California Film Exchange, 64 7th St.
Los Angeles, California Film Exchange, 110 B. 4th St.
COLO., Denver, Wm. H. Swanson Film Co., Railroad Bldg.
CONN., New Haven, Universal Film Exchange of N. Y., 850 Chapel St.
DIST. OF COL., Washington, Washington Film Exchange, 428 9th St. N. W.
FLA., Tampa, Consolidated Film & Supply Co.
GA., Atlanta, Consolidated Film & Supply Co., Rhodes Bldg.
ILL., Chicago, Anti-Trust Film Co., 128 W. Lake St.
Laemmle Film Service Co., 204 W. Lake St.
Standard Film Exchange, 172 W. Washington.
IND., Indianapolis, Central Film Service Co., 113 W. Georgia St.
IA., Des Moines, Laemmle Film Service, 421 Walnut St.
KAN., Wichita, Universal Film & Supply Co., 155 N. Main St.
KY., Louisville, Standard Film Exchange.
LA., New Orleans, Consolidated Film & Supply Co., Maison Blanche Bldg.
MD., Baltimore, Baltimore Film Exchange, 412 E. Baltimore St.
MASS., Boston, New England Universal Film Ex., 1100 Boylston St.

- 1 Springfield, Universal Film Exchange of N. Y., 317 Main St.
- MICH., Detroit, Universal Film Co., 87 Woodward Ave.
- Grand Rapids, Universal Film Exchange, 5 Hawkins Block.
- MINN., Minneapolis, Laemmle Film Service, 252 A Hennepin Ave.
- MO., Kansas City, Universal Film & Supply Co., 12th and McGee Sts.
- St. Louis, Universal Film & Supply Co., 804½ Pine St.
- MONTANA, Butte, Wm. H. Swanson Film Co.
- N.B.J., Omaha, Laemmle Film Service, 1312 Farnam St.
- N. J., Newark, Royal Film Exchange, 286 Market St.
- N. Y., Albany, Rex Film Exchange, 7 Maiden La.
- Buffalo, Victor Film Service, 39 Church St.
- N. Y. City, Universal Film Exchange, 111 E. 14th St.
- N. Y. City, Universal Film Exchange (Mecca Branch), 1600 B'way.
- N. C., Charlotte, Interstate Films Co.
- O., Cincinnati, Cincinnati Buckeye Film Exchange, 236 W. 4th Ave.
- 3 Cleveland, Victor Film Service, Prospect & Huron Sts.
- Toledo, Toledo Film Exchange Co., 439 Huron St.
- OKLA., Oklahoma City, United Motion Picture Co., 112 Main St.
- ORE., Portland, Film Supply Co. of Oregon, 385½ Adler St.
- PA., Harrisburg, Interstate Films Co.
- Philadelphia, Eagle Projection Co., 1304 Vine St.
- Philadelphia, Interstate Films Co., 1304 Vine St.
- Philadelphia, Philadelphia Film Exchange, 121 N. 9th St.
- 4 Pittsburgh, Independent Film Exchange, 415 Ferry St.
- Wilkes-Barre, Exhibitors Film Exchange, 61 So. Penn Ave.
- TENN., Memphis, Consolidated Film & Supply Co., Falls Bldg.
- TEX., Amarillo, Universal Film & Supply Co.
- Dallas, Consolidated Film & Supply Co., 1819 Elm St.
- El Paso, Consolidated Film & Supply Co., 505 Miles Bldg.
- El Paso, Wm. H. Swanson Film Co., Little Chaplin Bldg.

- UTAH, Salt Lake City, Wm. H. Swanson Film Co., McIntyre Bldg.
- W. VA., Wheeling, Universal Film Exchange.
- WIS., Milwaukee.
- WASH., Seattle, Film Supply Co., 1901 Fifth Ave.
- Spokane, Film Supply Co., 211 Jones Bldg.
- CANADA, Calgary Alta, Canadian Film Exchange, Monarch Theatre Bldg.
- Edmonton Alta, Canadian Film Exchange, Monarch Theatre Bldg.
- Montreal, Que., Canadian Film Exchange, 295 St. Catherine St.
- 2 Regina, Sask., Canadian Film Exchange, Rex Theatre Bldg.
- Saskatoon, Sask., Canadian Film Exchange, Hunt Block.
- Toronto, Ont., Canadian Film Exchange, 11 Richmond St. W.
- Winnipeg, Man., Canadian Film Exchange, Monarch Theatre Bldg.
- Vancouver, B. C., Canadian Film Exchange, 516 Holden Bldg.
- 3

Mr. GROSSVOR: Were these prepared by yourself, or were they prepared by them? Did they furnish you with these lists, or did you make them up?

The Witness: I made them up from my own information that I could get, and from my own knowledge.

Mr. GROSSVOR: I object to these last two statements, on the ground of insufficient knowledge on the part of this witness, the sources of his information not being disclosed.

By Mr. CALDWELL:

Q. Do you happen to know, Mr. Dyer, whether that has been compared with the advertisements of the Mutual and Universal companies in the Moving Picture World? A. That list has been compared with the advertisements of those two concerns in their own house organs or trade papers, but I

1 know of my own knowledge and my information that I get, of course, in the handling of the business, that those branches that I have testified to do in fact actually exist, and that we are encountering the competition in those territories that I have described.

Mr. CALDWELL: I offer in evidence a certified copy of the Opinion of Judge Kohlstant, filed in the case of Thomas A. Edison against Selig Polyscope Company, United States Circuit Court for the Northern District of Illinois, Eastern Division, marked "Filed January 29th, 1910, as of October 24th, 1907." This is the opinion referred to in Mr. Dyer's testimony on Monday, and I offer it in evidence because I am informed that it has not been officially reported in the Federal Reporter or in any other report, and I ask that it be copied in the record for that reason.

Mr. GROSVENOR: I do not understand counsel's statement that it is filed January 29th, 1910, as of October 24th, 1907. When was the opinion handed down? I object to the statement of counsel, in introducing it, that it was the opinion referred to by the witness on Monday, the proper way being to show the opinion to him and asking him to identify it and connect it with this testimony.

Mr. CALDWELL: The certificate of the Clerk, of course, speaks for itself. It is marked and endorsed, "Filed January 29th, 1910, as of October 24th, 1907."

By Mr. CALDWELL:

Q. Is that the opinion, Mr. Dyer, to which you referred in your testimony on Monday? A. Yes, sir.

Mr. GROSVENOR: When was that opinion given, Mr. Dyer?

The Witness: Well, in the latter part of 1907, and with this date before me, I should say October 24th, 1907.

Mr. GROSVENOR: But do you know?

The Witness: No, sir, I don't know the exact date.

Mr. GROSVENOR: I object to it as improperly proven.

Mr. CALDWELL: It is a certified copy under the seal of the court and authenticated in such a way as to entitle it to be admitted in evidence.

Mr. GROSVENOR: I object to it also on the ground it is immaterial.

The paper offered is received in evidence and marked Defendants' Exhibit No. 111, and is as follows:

Defendants' Exhibit No. 111. E. H.

IN THIS
CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN
DISTRICT OF ILLINOIS—EASTERN DIVISION.

THOMAS A. EDISON,

v.

SELIG POLYSCOPE COMPANY.

Gen. No. 26,512.
Kohlstant, J.

Bill to restrain alleged infringement of re-issue patent No. 12,037, granted to Thomas A. Edison, September 30, 1902, for Kinetoscope. The original patent was No. 589,185, dated August 31, 1897. The case is now before the court on motion for preliminary injunction. This suit was commenced November 7, 1902, and has been held by stipulation of the parties to await a decision of the United States Circuit Court of Appeals for the Second Circuit in a suit to restrain infringement of the patent herein involved, brought by the complainant herein against American Mutoscope and Biograph Company, it being agreed that the decision in that case would have an important bearing upon the questions involved herein. It was stipulated that the holding of this case until after final hearing of the New York case should not prejudice complainant's right to move for a preliminary injunction at any time.

On March 5, 1907, the Circuit Court of Appeals for the

1 Second Circuit rendered a decision finding Claims 1, 2 and 3 of the patent valid and infringed. The testimony taken in that case, las, by stipulation, been made a part of the record in the case at bar, and this, as well as the opinion of the Court of Appeals, shows a full hearing upon the merits. The validity of the patent in suit may, therefore, for the purposes of this hearing be considered as established.

Defendant admits the use of two kinds of machines, both of which are charged to infringe patent in suit; one of these is made in accordance with Letters Patent No. 712, 462, issued October 28, 1902, to William N. Selig for improvements for exhibiting and taking pictures; the other is what is known as the Lumiere camera, which is the one described and claimed in Letters Patent of the United States No. 579,882, issued March 30, 1897, to A. & L. Lumiere of Lyons, France.

2 The present motion is based upon the pleadings and proofs heretofore taken in this case, the testimony and evidence taken in the suit against the American Mutoscope and Biograph Company, the pleadings and decision of the Circuit Court and the Circuit Court of Appeals for the Second Circuit, and certain affidavits. Models of the Selig camera, the Edison camera, and of the infringing device of defendant in the mutoscope case, *supra*, known as the Warwick camera, are before the court, and the affidavits of experts have been presented on behalf of complainant to show that the Selig and Lumiere machines of defendant herein are substantially identical in material respects with the Warwick camera of the New York case. Defendant makes no attempt to rebut this evidence, but urges that either of the following grounds is sufficient to warrant the denial of this motion.

1st. That defendant is operating under a patent issued to it October 28, 1902, on an application filed September 6, 1900, which exactly describes and exactly claims the combinations charged to infringe. Both complainant and defendant, therefore, have patents for their respective machines. "In such cases," says counsel for defendant, "the courts have held times without number, that there was a presumption that there was a substantial or ma-

terial difference between the inventions, and that one did not infringe the other."

2nd. "Defendant's machine charged to infringe the Edison reissue patent sued on, was made and put into use long prior to the application for the reissue, was not an infringement of the claims of the original Edison patent, was made and put into use rightfully, because not an infringement of any valid claim of the original Edison patent, and is entitled to protection under the doctrine of intervening rights."

3 That there is such a presumption in favor of the later patent, as stated in defendant's first ground, must be admitted. It is not, however, a conclusive presumption, and there may be evidence to overcome it.

The second ground urged by defendant to defeat this motion can, of course, only apply to acts occurring prior to the reissue. It would seem a good defense as to those acts. Defendants, however, admit in the affidavits of William N. Selig, the sale, since the reissue, of one camera made under the Selig patent, and the purchase and use of three Lumiere cameras. An injunction does not affect past acts; it is designed for the prevention of those which might be committed in the future, and if defendant's device be found to infringe complainant's patent, the admitted use since the reissue would seem sufficient ground to restrain such future acts. The sole question before the court then is: Do the Selig and Lumiere machines infringe the Edison reissue patent in suit?

4 The original patent, No. 589,168, was before the Court of Appeals for the Second Circuit in a suit between the same parties and after a full hearing, Claims 1, 2, 3, 4, and 5 were held invalid, as claiming more in view of the prior art than patentee was entitled to. The court there found that Edison "was not a pioneer, in the broad sense of the term," and said that the real invention, if it involved invention as distinguished from improvement, probably consisted in details of organization, by which the capacity of the reels and moving devices are augmented and adapted to carry the film of the patent rapidly and properly (114 Fed. Rep., 926). The patentee, thereupon applied for and obtained the reissue patent in suit, Claims 1, 2, and 3 of which are as follows:

1 "1. An apparatus for taking photographs suitable for the exhibition of objects in motion, having in combination a camera having a single stationary lens; a single sensitized tape-film supported on opposite sides of, and longitudinally movable with respect to, the lens, and having an intermediate section crossing the lens; feeding devices engaging such intermediate section of the film and moving the same across the lens of the camera at a high rate of speed and with an intermittent motion; and a shutter exposing successive portions of the film during the periods of rest, substantially as set forth:

2 "2. An apparatus for taking photographs suitable for the exhibition of objects in motion, having in combination a camera having a single stationary lens; a single sensitized tape-film supported on opposite sides of, and longitudinally movable with respect to, the lens, and having an intermediate section crossing the lens; a continuously-rotating driving-shaft; feeding devices operated by said shaft engaging such intermediate section of the film and moving the same across the lens of the camera at a high rate of speed and with an intermittent motion; and a continuously-rotating shutter operated by said shaft for exposing successive portions of the film during the periods of rest, substantially as set forth.

3 "3. An apparatus for taking photographs suitable for an exhibition of objects in motion, having in combination a camera having a single stationary lens; a single sensitized tape-film supported on opposite sides of, and longitudinally movable with respect to, the lens, and having an intermediate section crossing the lens; a continuously-rotating driving-shaft; feeding devices operated by said shaft engaging such intermediate section of the film and moving the same across the lens of the camera at a high rate of speed and with an intermittent motion; a shutter exposing successive portions of the film during the periods of rest; and a reel revolved by

said shaft with variable speed for winding the film thereon after exposure, substantially as set forth."

The invention is a narrow one, and the proper interpretation of the claims, so as to confine the patent to its real contribution to the art, has been, as the decision of the Circuit Court and the Circuit Court of Appeals show, a matter of no little difficulty. But the Court of Appeals has construed the claims of the patent, and it has been held that on a motion for preliminary injunction the court should be "guided and governed by the construction which was given to the patent in the adjudicated case upon which the special presumption of validity is based, Walker on Patents, Sec. 676, citing Mallory Mfg. Company v. Hickok, 20 Fed. Rep., 116; Carter-Crumme Co. v. Ashley, 68 Fed. Rep., 370," and where the facts are substantially the same in the two cases, the former decision will be followed. S. S. White Dental Mfg. Co. v. Johnson, 56 Fed. Rep., 253. The Selig and Lumiere cameras are substantially identical with the Warwick camera in those features found by the Court of Appeals to be of the essence of the invention of Edison. The description which the Circuit Court of Appeals of New York applied to the Warwick camera may be applied literally to defendant's Selig camera. The court said:

"The engaging rollers, which advance the film after it has passed the film-slide or guide where exposure is made and which deliver it to the take-up reel are located about half way between the take-up reel and the film-slide and their movement is so regulated as to other parts that there will always be a loop of slack film between said rollers and the film-slide. In consequence, the film cannot be advanced by any revolution of these rollers, as was the case with the Biograph camera. The film as it comes from the delivery roll has a row of holes along each edge; when it is in the film-slide these holes are engaged by means of a reciprocating twin fork, carrying small studs or pins which pass into the holes on the opposite edges of the film, in the same way as the sprockets pass into the holes in the complainant's machine. As these studs or

1 pins are inserted on the down stroke of the fork and withdrawn on the up stroke, the film is intermittently fed across the field of the lens. These pins or studs do not hold back the film against any forward pull, because there is no forward pull to be resisted; neither an intentional forward pull as found in the biograph, nor an accidental or occasional forward pull as when the film is torn between the film-slide and take-up roll as found in the camera of the patent; when the pins are withdrawn the film lies flat in the film-slide."

2 But the "intermediate section" is moved across the lens just by the interlocking engagement between a sprocket or pin and a hole in the film, thereby moving it positively, regularly, evenly and very rapidly without jarring, jerking or slipping—the parts being arranged so that the movement shall be intermittent."

3 The Lumiere machine has no take-up reel, the film being allowed to lie loosely in the bottom of the box, and there are no rollers engaging the film, either before or after exposure. It does have the fork with the studs or pins, and its mode of operation is otherwise the same as that of the Warwick camera, as above described by the Court of Appeals.

The motion for a preliminary injunction is, therefore, granted.

(Endorsed) filed Jan. 29, 1910, as of Oct. 24, 1907.

H. S. STODDARD,
Clerk.

IN THE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS—EASTERN DIVISION.

I, T. C. MacMILLAN, Clerk of the District Court of the United States of America, for the Northern District of Illinois, DO HEREBY CERTIFY the above and foregoing to be a true and correct copy of the OPINION of Hon. Judge C. C. Kohlstedt, filed Jan. 29, 1910, as of Oct. 24, 1907, in the case of THOMAS A. EDISON v. SELIG

POLYSCOPE COMPANY, as the same appears from the original records and files now remaining in my custody and control.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 26th day of March, A. D. 1912.

[SEAL.]

T. C. MACMILLAN,
Clerk.

By JOHN H. R. JAMES,
Deputy Clerk.

Mr. CALDWELL: It is past our usual time of adjournment, and I suggest we adjourn until tomorrow. The Examiner: We will adjourn until 10:30 o'clock tomorrow morning.

Whereupon, at 4:40 P. M. on this Wednesday, the 12th day of November, 1913, the hearings are adjourned until Thursday, November 12th, 1913, at 10:30 A. M., at the Hotel Manhattan, New York City.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA,	} No. 889. Sept. Sess., 1912.
Petitioner,	
v.	
MOTION PICTURE PATENTS CO. and others,	Defendants.

NEW YORK CITY, November 13, 1913.

The hearings were resumed pursuant to adjournment at 10:30 o'clock A. M., November 13, 1913, at Room 139, Manhattan Hotel, New York City.

Present on behalf of the Petitioner, Hon. EDWIN P. GROSVENOR, Special Assistant to the Attorney General.

J. R. DARLING, Esq., Special Agent.

Present also, Messrs. CHARLES F. KINGSLEY, GEORGE R. WILLES and FRED R. WILLIAMS, appearing for Motion Picture Patents Company, Biograph Company, Jeremiah J. Kennedy, Harry N. Marvin and Armat Moving Picture Company.

J. H. CALDWELL, appearing for William Patzer, General Film Company, Thomas A. Edison, Inc., Kalem Company, Inc., Pathe Freres, Frank L. Dyer, Samuel Long and J. A. Berst. Mr. HENRY MELVILLE, attorney for George Kline, Essanay Film Manufacturing Company, Selig Polyscope, George K. Spoor and W. N. Selig. Mr. JAMES J. ALLEN, appearing for Vitagraph Company of America, and Albert E. Smith.

The Examiner: Defendants' Exhibit No. 111, being certified copy of the opinion of Judge Kohl.

1 sat, in case of Thomas A. Edison v. Selig Polyscope Company, United States Circuit Court for the Northern District of Illinois, Eastern District, has been returned to Mr. Caldwell.

Thereupon FRANK L. DYER resumed the stand.

Direct examination continued by Mr. CALDWELL:

2 Q. Mr. Dyer, in testifying yesterday about the territory served from your office maintained at Oklahoma City, Oklahoma, at page 1070 of the record, folio 1, you stated that that territory included some towns in the northern part of Texas, and some customers, as you recalled, in Arkansas and Indian Territory. Did you mean Indian Territory? A. No, the fact had momentarily slipped my memory that the territory of Oklahoma and the Indian Territory were united and constituted the State of Oklahoma. I should have said the Indian counties of Oklahoma.

3 Q. In testifying yesterday, your recollection was not quite clear as to the territory served by your competitors from branches maintained by them at Amarillo, Texas. Have you since refreshed your recollection on that subject? A. I was not certain whether the Amarillo branches of our two competitors competed directly with our Dallas branch, or whether direct competition existed. Amarillo is a town in the Panhandle of Texas to the west of Oklahoma City, and eastward from Mexico. It lies within the territory circumscribed by our Dallas, Oklahoma City and Denver branches, where our competitors are also located. Their branches at Amarillo are, therefore, more directly in the center of this territory than we are. In other words, we have to reach into the territory from the outside, towards the center, whereas they not only reach in from the outside towards the center, but reach outwardly from the center to the circumference of the territory.

4 Q. You stated yesterday, some of the benefits or advantages resulting to the public from the organization and operation of the Motion Picture Patents Company. Have you anything to add to that statement? A. Yes, I would like to make a further addition, because the matter, I think, is important. The formation of the Patents Company, with the resulting development in the building of new theatres,

and extending the number of theatres, small theatres, places where the poor man might take his family in the evening to see a clean, instructive, and entertaining show. The saloon is no longer the poor man's club, and all over the country it will be found that the moving picture theatre has seriously interfered with the saloon business. In fact, our most bitter opponents are the saloon interests, and I know of one case in Ohio where the number of saloon licenses was reduced from thirty-two to seventeen, owing to the presence in that town of moving picture theatres. Whereas, formerly the poor man would go to the saloon and spend the evening, paying twenty-five cents for beer, he now takes his family to the moving picture show at the same price.

Q. You have spoken about the General Film Company and its branches. Where is the main office of the General Film Company located? A. At No. 200 Fifth Avenue, in the Fifth Avenue Building, New York City.

Q. Are any motion pictures distributed from that office? A. No, sir, that is purely an executive and administrative office, where the bookkeeping department is located, and the other executive departments.

Q. When a branch of the General Film Company orders pictures from a producer, or importer, are the pictures sent by the producer, or importer, first to the main office of the General Film Company, or to some warehouse or other place maintained by it, and sent from there to the branches, or are the pictures sent direct from the producer and importer to the branch? A. The plays are sent direct from the producer to the branch.

Q. Mr. Dyer, will you explain in detail the practical workings of an exchange, just how a film is received from the producer or importer, what becomes of it after it is received, how the films are booked by the booking office of the branch, how they are sent from the branch to the exhibiting office, and how they are returned by the exhibiting theater to the branch, and what becomes of the films in the interim between their return by one exhibitor and the delivery of that same film to another exhibitor? A. Each branch of the General Film Company is a distributing point or booking office, occupying a middle position between the producers of the pictures and the theatres in which they are shown. At each branch there is a stock of films kept in the usual cylindrical boxes, and generally is fireproof vaults, so as to minimize the

- 1 danger from fire. New films are coming into the branch from the producers almost daily, and old films are, after the lease period has expired, returned to the producers, generally monthly. So that the stocks of films do not materially change except that there is a slow growth due to the gradual increase of the number of films released. When the film is received from the producer it is generally inspected so as to be sure that it is in good condition, and it is then numbered by means of a perforating machine, something like a check punch, so that it can be identified. It is then placed in the stock in its proper place. At each branch there are one or more bookers who are the men who have the duty of making up the program of the theatres, and whose job it is to keep the films working as actively as possible. These bookers are supposed to have a general knowledge of the character of the films made by the several producers, and are also required to keep themselves informed as to the character of individual films so that they will know the kind of plays they are handling. They are also required to know the general character of the theatres that they supply so as to make the programs as appropriate as possible. Where an exchange necessitates the employment of more than one booker, each booker has his own list of exhibitors that he handles. In most of the exchanges there are definite booking systems in vogue so as to keep a written record of the films to enable the manufacturers to tell whether they are being properly worked or not; and these booking systems differ more or less in the various branches. A theatre requiring service of a branch arranges with the manager to receive a certain number of films per week, changed a definite number of times, and the age of the film is determined entirely by negotiations between the theatre and the manager. Sometimes requests are made for ages of film that we are not able to supply, so that some adjustment in this respect has to be made. The booker is advised of the age of the film the particular customer has contracted for, and endeavors, as far as possible, to supply films of that age, and to make the program balance, and as interesting and as adaptable as possible to the conditions of the particular theatre. In the case of theatres located in the same city as the branch, or in the neighborhood of that city, the theatres generally send messengers into the branch to get their films in the forenoon, but in other cases the films are sent to the exhibitors by express. Flocking cases are used containing gen-

erally three reels, and each case is marked with the number corresponding to the particular customer. In some places, and particularly in New York, the General Film Company maintains, or has made arrangements with an agency to collect shows from the theatres in the city, after they have been exhibited, and bring them back to the exchange, but ordinarily the theatre sends the film back to the branch either by a messenger or by express. In a few of the very active exchanges, as, for example, the exchanges in Philadelphia, New York, Boston, Chicago and other large cities, the films are coming back into the exchange from about midnight onwards, and as soon as they are received they are inspected carefully, and any repairs made, and placed in stock, so that they can go out by eight o'clock in the morning. I think that in almost all the branches they maintain night shifts, so that the branches are working generally at all times. In those branches where poster departments are located, when we send out the films by express we also include the necessary posters contracted for, or, if the messenger of the theatre calls at the branch, he gets the posters at the same time, and takes them with him. The great problem, as I have stated before, is to handle an enormous number of reels of great variety, involving many changes per week, and to deal with the number of theatres in such a way that the films will be moving to the maximum extent. In the whole country, I should say, that there are at least twenty thousand moving picture plays moving every day towards—

Mr. GROSVENOR (interrupting): You don't mean plays?

The Witness: Plays or films?

Mr. GROSVENOR: Different plays?

The Witness: Different plays.

Mr. GROSVENOR: You don't mean under different titles?

Mr. KINGSLEY: I object to the witness being told what he means.

Mr. GROSVENOR: I was trying to have it clear on the record.

- 1 The Witness: Yes, I think twenty thousand would be within the bounds of safety. Twenty thousand moving picture plays, moving at all times from or towards theatres, and back to the exchanges.

By Mr. CALDWELL:

- Q. Does it sometimes happen that an exhibitor will fail to return a picture the following day, in time for you to use it with a customer who has contracted for it, for that particular day? A. That sometimes happens, yes, sir.

- 2 Q. With more or less frequency? A. Well, I presume it seems more than it is, because there is always so much noise over it, because it seems like a very important thing for if a theatre has a film booked for a certain evening, and he comes down to the office and finds that he cannot get the film, it is naturally very annoying to him. This happens, sometimes, by fault of express companies.

- Q. But whenever it does happen, does it represent an actual loss to the exchange? A. Oh, yes, that means that we lose that particular film for that time, and we always have to give the exhibitor something to take its place, of equivalent age, and endeavor to satisfy him with a substitute reel.

- 3 Q. Where the exhibiting theatre is located at some distance from the exchange, or branch, are films always returned by the exhibitor to the exchange before they are sent out to the next exhibitor? A. Not always, but ordinarily so. As I stated yesterday, in Florida, we send out reels on a circuit, and they may go to eight or ten exhibitors before coming back to the exchange.

- Q. Does the period of transit there represent a loss to the exchange? A. Theoretically, it would not represent a loss, but in actual practice it does, because it is difficult to get a theatre to take the same interest in keeping the films moving as we have, and, while the films ought to be passed around the circuit in ten days, we find that it will frequently take a month.

- 4 Q. I think you have stated that the maximum value of film to the exchange is based upon its constant use? A. That is true.

- Q. If more or less time is lost during those periods of transit back and forth, does that not represent so much

- 1 earning power deducted from the film? A. Oh, yes. I thought you had in mind only the circuits. Of course, where the film is in transit there is a loss in its earning power.

- Q. Have you stated yet, Mr. Dyer, what facilities are maintained at the branches of the General Film Company, for inspecting, cleaning, and repairing film between these periods of use in the theatres? A. Yes, we maintain at each branch an inspection department, generally of two or three shifts, so that they keep working all the time, composed of from two to as many as fifteen girls, or young men, and each reel coming in is carefully unwound by these inspectors, who run the film between their thumb and forefinger so as to detect broken places in the edges, and in case the break is a bad one, a splice is made, and these inspectors also carefully inspect the film, see that it is kept clean, free from dirt, and kept in good condition; and in some branches they actually use cleaning machines that subject the film to a cleaning operation, to wipe off the dirt and oil. A great deal of oil gets on the film from the projecting machine, and this oil collects dirt and dust, that makes spots on the film, which show on the screen.

- 3 Q. Do you know to what extent exchanges, prior to the formation of the General Film Company, maintained facilities for inspecting, cleaning, and repairing films? A. Not any more than to say that any inspection or repairing, as far as I knew, was less effective than that used by the General Film Company, or none at all.

- Q. Will you state in what reciprocates these films are placed by the producer, or importer, in order to be sent to the branches of the exchanges? A. In tin boxes.

- Q. And what is the weight of a single reel of a thousand feet in a box, including the box? A. I have forgotten, but I think somewhat over five pounds.

- 4 Q. Do you know whether any of these boxes are ever sent by parcel post? A. I do not.

- Q. In sparsely settled territory where you could not serve a theatre, either by messenger or by express, it is feasible to serve by parcel post? A. I am not able to state. I think it might be.

- Q. Mr. Dyer, do you know of a single city or town anywhere in the United States with a population sufficient to support a motion picture theatre in which no such

1 theatre is located? I asked you if you knew of any such city or town? A. No, I do not. The only city that I know of that came near fitting your definition, is my own town of Montclair, where we built a moving picture theatre for the first time this year, but Montclair did not have trolley cars until about five years ago.

Q. Do you know of any city or town in the United States, where a motion picture theatre is now being conducted that cannot obtain its service either from the General Film Company, or one or both of its competitors?

A. No, I do not.

2 Q. And it is entirely optional with any such theatre from which exchange it will take its service? A. Yes, absolutely so.

Q. And the theatre is entirely free to decide that question for itself? Is that correct? A. That is correct, except that the Mutual Company has, in a certain number of places, sold the exclusive right to its service, which would prevent other theatres possibly from getting the Mutual program in those particular localities, but with that exception, I know of no reason why any theatre in the United States should not be able to get its service from either of the three companies.

3 Q. Mr. Dyer, you have testified relative to the competition which the General Film Company has with its two leading competitors, the Mutual Company and the Universal Company. Has it any other competition, particularly in the matter of special feature films for special service, or exclusive service, and if so, will you please state what it is? A. We have a great deal of competition in this respect. These feature films have been appearing in greater and greater number in this country, and are handled by various people, such as the Famous Players Film Company, Warner Features Company, and the various State rights concerns, that is to say, people who have acquired the right for a particular State, or series of States, in certain films. I refer to such features as "Cleopatra" by the Helen Gardener Company, pictures made by the Gessie Gaudier Company, and many others. The trade papers are filled with advertisements of these films. Our theatres are using these films to quite a considerable extent, and their introduction into our theatres of course reduces the value of our service or entirely supplants it. For instance, we have theatres in the country

who are taking the Famous Player service, and, as I recall, this takes away our revenues for three days every other week. The introduction of these special features into the service of our theatres is quite an important factor at the present time in the business.

Q. Do you know what the Famous Players Film Company, for instance, are doing by way of competition with the General Film Company, and who are interested in it? A. The Famous Players Company is a concern managed by Mr. Daniel Frohman, and they are making a series of thirty films per year, two in one month, and three in the next month. These films are based on famous plays, such as the "Prisoner of Zenda," the "Toss of the D'Arbervilles," "In the Bishop's Carriage," etc., and generally a well-known star appears in each one, such as Mrs. Pike. These plays are generally from three to five reels. The Famous Players Company makes arrangements with theatres, and very often with our customers, to take their service for a year, and the films appear in our theatres generally every other week for from one to three days.

Q. And when they do appear in your theatres, the Famous Players Company is depriving you of that service during that time; is that correct? A. That is not only correct, but it is also a fact that owing to the expensive character of these Famous Players films generally the theatre reduces the price, or curtails its service with us; takes on a cheaper service from the General Film Company.

Q. In what class of theatres is that service customary? A. Generally in the large theatres.

Q. So that to that extent these people are taking away from you your best customers; is that correct?

Mr. GROSVENOR: Objected to as leading, and too general.

Mr. CALDWELL: It is withdrawn.

By Mr. CALDWELL:

Q. State what character of customers you are losing as a result of the competition of the Famous Players Company? A. I do not say we are losing customers—I say we are losing business, and losing money.

Q. From what class of your customers? A. Generally the very large theatres.

1 Q. Do you know in what territory the Famous Players Film Company are operating? Is it limited to New York or Chicago, or is it general throughout the country? A. General throughout the country. I know specifically that they are competing with us in the New England territory, in the Atlanta territory, in the Chicago territory, and in the California territory and elsewhere.

2 Q. And what is the character of the service maintained by the Warner Feature Film Company? A. That concern handles feature films made either in America or abroad, and puts them out in as many theatres and at the best prices they can get. I do not think they have started a regular defined service as yet, although they are advertising that they expect to do so. They have offices all over the country, and men going around among the exhibitors trying to interest them in their feature films.

Q. Is it not a fact that this concern or its predecessor in business, has been actually supplying special feature films throughout the United States or in portions of the United States? A. Yes, sir.

3 Q. Do you know anything about the business conducted by the Exclusive Supply Corporation? A. No, sir, I do not. Not specifically. I do not know of any instances where these films have been specifically brought to my attention.

Q. Do you know whether the Famous Players Film Company supply an exclusive service? A. Oh, yes.

Q. Explain what is meant by exclusive service as applied to the motion picture business. A. An exclusive service would be one in which the guarantee goes with certain films that they will be shown exclusively in a single theatre in a given territory.

4 Q. And if shown at another theatre, of course the service loses its exclusive character, does it not? A. Yes, sir.

Q. And loses entirely the value which was contracted for? A. Very largely.

Q. Mr. Dyer, I would like you to read portions of the testimony of the witness Swanson, a witness called on behalf of the petitioner, as I wish to ask you some questions about it. Will you read pages 329 and 330, commencing at folio 3 on page 329? A. (Witness reading): Yes, sir, I have read this testimony.

Q. Now, will you read page 369, Mr. Dyer? A. Beginning at what point, Mr. Caldwell?

Q. Beginning at the top of the page, and reading down to the end of the second question. A. (Witness reading): Yes, sir.

Q. Now, will you read the top of page 801? A. (Witness reading): Yes, sir, I have also read this.

Q. Mr. Swanson quotes you as saying at the Film Service Association meeting, as follows: "Mr. Dyer did most of the explaining regarding patents, and the ideas of what they were going to do under those patents. They were going to charge more for the film and more for the projecting machines under those patents." Do you recall whether you made that statement or not? A. No, sir, I did not make that statement.

Q. Continuing, the witness says: "He further explained that we must always bear in mind that we were not to put too much stress on the patents, however, that the proposition that they had formed was ninety-five per cent. commercial and five per cent. legal, that is, that this formation was ninety-five per cent. commercial and five per cent. legal, that they had patents, but that there had always been more or less litigation over this thing, and perhaps always would be, but that the success of the entire matter depended upon the commercial organization." Do you recall whether you made any such statement as that? A. No, sir, I do not recall having made that statement. I do not recall having made any attempt to weigh specifically the advantages of the patents and the advantages of the commercial results growing out of the patents. I recognized, of course, that the value of the patents would not be so great as the development of the commercial side, or, in other words, that any contribution that they made under the patents would be small compared to the commercial advantages accruing from the arrangement that brought an end to the patent litigation, but I do not recall specifically having attempted to state the two propositions in terms of percentage. If Mr. Swanson means by his testimony that we looked upon the patents as unimportant, that is, entirely incorrect, because the patents at all times were regarded by us as the basis, the very foundation, upon which the licensing plan rested.

Q. Again, at page 369, he quotes you as having made the same statement at the meeting of the Film Service Association in Buffalo. I think you have already stated that you were present at that Buffalo meeting. Did you make any

1 such statement as that at the Buffalo meeting? A. Not that I recall, no, sir. I always recognized that the contribution paid under the patents would be less than the resulting commercial advantages.

Q. Again, on cross examination, at page 801, he says that it was a favorite expression of yours, "Five per cent. legal and ninety-five per cent. commercial," and through the medium of the patents they could bring about a commercial organization that would be beneficial to those interested. Was that a favorite expression of yours? A. I don't think so, although I always recognized, of course, that the value of the patents would necessarily depend only upon the commercial success which our licensees met with, or, in other words, unless they succeeded commercially, we would not profit under the patents.

Q. Mr. Dyer, will you turn to page 330 of the record, commencing at the middle of the page, at the question asked by Mr. Grosvenor, and reading to the bottom of the page.

A. Yes, sir; I have read this before.

Q. So your recollection is refreshed? A. Yes, sir.

8 Mr. GROSVENOR: Which is it, what Mr. Swanson testified is refreshed—

The Witness (interrupting): Yes, sir. I read this this morning. This is one of the things that Mr. Caldwell asked me to read.

By Mr. CALDWELL:

Q. Mr. Swanson there states that he came here as a committee of one, representing all of the Edison film exchanges in Chicago, that he arrived on Saturday, the exact date, he cannot recall, and called you up on the telephone at Orange, to make an appointment, as he stated, "to discuss conditions under those patents, which we proposed to make to him." That you were going hunting; and would not be back until Monday, and asked him to submit his proposition over the telephone, and he then said—now quoting his exact language: "We, in Chicago, have decided that we will combine our business and make the Edison Company a present of one-half of all our interests in our combined business, if they can show us where they can shut out the

independent competition we are now having in Chicago." He continues by saying that, quoting you, "He said that was a great idea. He had not thought of it, but that he would work it up as soon as he came back from his hunting trip, and he thought very likely it could be accomplished, and it later was, except that they bought the exchanges out altogether." State what truth, if any, is there in this testimony? A. I do not think there is any truth in it. I do not recall having had any conversation with Mr. Swanson over the telephone at any time. I am quite sure that I never met Mr. Swanson more than three or four times in my life, although I remember very well that the second time he met me he called me "Frank," and has always done so.

Mr. GROSVENOR: And you called him "Bill" yesterday, when you referred to him, in examination?

The Witness: I reciprocated the compliment, yes, sir. A. (continuing): I never went hunting in my life, so that he is certainly wrong in that statement. I am certain that he never made any suggestion to me about giving the Edison Company a present of half of the exchanges in Chicago. That would have been a very silly suggestion, indeed, and I am quite certain that Swanson never could have made it. In whatever talks I may have had with Swanson, or anybody else, on the subject of independent competition in Chicago, I always had in mind the possibility of stopping this by patent suits, and in no other way.

Q. Now, will you read pages 325 and 326, commencing on page 325, near the top of the page, the first question by Mr. Grosvenor? A. (Witness reading): Yes, sir, I have read this testimony.

Q. In connection with the suits brought by the Edison Company against Kleine and his licensees in Chicago in 1908, Swanson says that he had several conversations with you about this, that he complained to you about Kleine cutting prices of films to a ruinous basis, and you said you thought you could find a way of stopping it. He asked you how, and you said you would have an attorney in Chicago bring suits against Kleine's exhibitors, that your purpose was to bring a multiplicity of suits and harass

1 them to such an extent, that they would eventually stop
 using Kline's goods, that you stated that these suits
 were brought for the purpose of intimidating exhibitors.
 Further, that you wanted to find exhibitors or defendants
 that did not have too much money, but had some resources,
 and were responsible, as they would have more regard for
 the dangers of litigation than some more irresponsible
 exhibitors, and that you had Mr. Mithin, who was western
 secretary of the Film Service Association, as he says, in-
 2 vestigate the financial standing of the exhibitors before
 suit was brought. State what truth there is, if any, in the
 foregoing testimony? A. I do not think there is very
 much truth in it. My recollection is that Kline did not
 cut prices, and that the troubles in Chicago were due en-
 tirely to the price-cutting and unfair competition on the
 part of the licensed exchanges. A number of the suits,
 a considerable number of the suits, were brought in Chi-
 cago, against infringing theatres, but these suits were
 brought for the purpose of enforcing our patent rights.
 I do not recall having talked with Mr. Swanson about
 these suits, but may have done so. His troubles were not
 3 competition from Kline, but competition from other licens-
 es. One of the criticisms I had towards the exchanges in
 Chicago was that they kept constantly trying to take
 business from each other, instead of trying to get business
 from the independent, as we called them. Mr. Swanson, at
 one of the few talks I had with him, recommended his
 friend, Mr. Mithin, to me, as an attorney, but according to
 my best recollection, Mr. Mithin had nothing to do with
 the suits that were brought against the theatres, although
 he may have done so.

4 Mr. GROSVENOR: He says right here he did not
 have anything to do with it.

The Witness: My best recollection is that Mr. Mithin
 was employed to look up evidence against a duping concern
 in Chicago. This work was quite limited.

By Mr. CALDWELL:

Q. Then were these suits brought by the Edison Com-

pany against these exhibitors for the purpose of intimidat-
 ing them? A. No, sir.

Q. And taking them away from Kline? A. No, sir.
 The suits were brought against infringers of our patents
 for the purpose of enforcing the patents.

Q. That, of course, was during the period of the
 so-called warfare between the Edison and Biograph Camps?
 A. In a period of very bitter and very active hostili-
 ties. Mr. Swanson, in his evidence, states that it was my
 purpose to find exhibitors who did not have too much
 money, but had some resources and were responsible, but
 I have no recollection of this. I do not recall that the char-
 3 acter of the infringers was looked into in any way in con-
 nection with those suits.

Q. If any such conversation was had, you would be apt
 to recollect it, would you not? A. I think I would, al-
 though, of course, a lot of things were said that I cannot
 recall. I am quite sure that this conversation that
 Mr. Swanson speaks of did not take place.

Q. In connection with the suits brought by the Edison
 Company against Kline and his customers in 1908, Swanson
 says, referring to the same pages of the record there, that he
 had several conversations with you about this. Do you recall
 having more than one conversation with Swanson in Chicago?
 3 A. No, sir, I do not.

Q. He further says that he complained to you about
 Kline cutting prices of film to a ruinous basis. Do you
 recall stating anything of that kind? A. No, sir, I have
 already stated that I do not think that Kline did cut prices.
 The trouble entirely was in the unfair struggle between the
 licensed exchanges in Chicago to get customers from each
 other.

Q. He says that he asked you if it was possible to elimi-
 4 nate that ruinous competition, and you said that you did not
 think that it was. Do you recall his asking you that ques-
 tion? That is at page 326. A. What ruinous competition
 is he referring to? Between the licensed exchanges, or be-
 tween the licensed exchanges and the outsiders?

Mr. GROSVENOR: I object to the witness asking
 questions. He should read the testimony and decide
 in his own mind.

1 By Mr. CALDWELL:

Q. Then read again, Mr. Dyer, the few questions and answers immediately preceding the last question on page 326.

A. (witness reading): Yes.

Q. Do you recall his asking any such question and your giving any such answer? A. No, sir, I do not recall Mr. Swanson specifically having asked me this question, but I do recall that I was asked by a good many exchange men whether anything could be done to eliminate the competition with the so-called independents or infringers, and I stated that the only thing that could be done was by suits on our patents.

2 That was my constant reply to all of these inquiries.

Q. He says that he suggested to you a getting together with Kline, and offered to act as an intermediary, and you told him to go ahead. Did you ask him to act as intermediary between the Edison Company and the licensees and Kline?

A. No, sir. Mr. Swanson is not the kind of a man that I would select as an intermediary, and I do not recall any suggestion of his that he should act as an intermediary, and I knew at that time that the interest that was primarily opposed to us at that time was not Mr. Kline, but was the

8 Biograph Company, and if there was going to be any getting together, it would have to be with the Biograph Company. Mr. Kline's approaching me was not at the suggestion of Mr. Swanson, so far as I know. It was after the preliminary meeting with Mr. Marvin and Mr. Kennedy, as I have already testified.

Q. He further testifies there that he saw Kline and told you that Kline said he was willing to drop all trouble and work in harmony with the Edison licensees if it was possible to do so, but that they had refused to pay a royalty to the Edison Company of one-half per cent., and his associates in the Biograph Company would require a division of that royalty before they would consider any peace negotiations, and that when he reported this information back to you, you said that terminated the matter, as the Edison Company would not agree to give any division of the royalties, as "the old man needs the money" as he puts it. Did you make any

4 such statement to Mr. Swanson? A. No, sir, I have no recollection whatever of having discussed with Mr. Swanson the question of the possible settlement of the difficulties between the Edison Company and the Biograph Company, and I have

no recollection of the conversations to which you refer. My present recollection is that Mr. Kline came to me of his own initiative and asked me to meet him at the Republican Club, in the Summer of 1908.

Q. Mr. Dyer, will you turn to pages 1023 and 1024 of the record, and read that portion of the testimony of the witness Stryckmanns, which you find there. A. (witness reading): Yes, sir, I have read this.

Q. Mr. Stryckmanns says that Kline told him that you told Kline that the reason why Kline was restricted to the Urban Ellipse and Gaumont films was that Gaumont had an independent and non-fringing camera, and that they wished to bring the Gaumont Company into the combination in order that these valuable patents would not fall into the hands of the independents. Did you make any such statement as this to Kline? A. I did not. The reason the Gaumont films were selected, as I said in my previous testimony, was that they represented the best of the output handled by Mr. Kline.

Q. And Mr. Kline wanted to continue to handle the Gaumont films for this reason? A. Yes, sir. The Gaumont patent had absolutely nothing to do with it.

Q. Now, will you return to the record, and read pages 310 and 304? A. (witness reading): Yes, sir.

Q. Have you read that? A. I have.

Q. Do you recall the fact that a committee representing the Film Service Association called on you at your office, No. 10 Fifth Avenue, about that time? A. Yes, sir.

Q. Do you recall who the members of that committee were? A. Mr. Waters, Mr. Clark, Mr. Howard, and Mr. Aiken, I remember, and possibly also Mr. Swanson.

Q. Will you state, as near as you can recollect, just what was said at that meeting by any member of the committee and by yourself? A. I am not able to remember the conversations or who did the talking. I think Mr. Marvin was present, and also Mr. Scull. My recollection is that the important thing that this committee wanted to have us agree to was to eliminate the fourteen-day cancellation clause, which we refused to do. The committee also brought up, as I recall, the question of the Patents Company collecting the royalties directly from the theatres, because at that time, as I recall, we had concluded to have the exchanges collect the royalties, and they objected to this. And either at that time

1 or when the sub-committee came to my office in Orange, I
agreed, after consulting with Mr. Marvin, to have the Patents
Company collect the royalties directly; And we did collect
the royalties directly, for some time.

Q. Do you know who constituted the sub-committee that
called on you at Orange the following day? A. Mr. Gilling-
ham was one, and Mr. Lieber the other.

Q. Did you tell Mr. Swanson or any other member of the
committee that the cancellation clause of the exchange li-
cense would be enforced only in cases of violation of the
terms and conditions of the license? A. I did not.

3 Q. Did you state to Mr. Swanson or any other member
of the committee that the exchanges would have to collect
the royalties? A. My recollection is that that was the plan
that we had first in mind, to have the exchanges collect the
royalty, and we agreed that the Patents Company would col-
lect the royalties, or would try to. And my recollection is
that we did.

Q. Did you state to Mr. Swanson, or any other member
of the committee, that you, meaning the manufacturers,
had the situation pretty well in hand, and had competition
shut out, and those those that were fortunate enough to
8 secure licenses would undoubtedly make more money than
they ever did in their lives, that you had absolute control
of the business? A. I don't recall having made that state-
ment to any exchange man. I did think, however, that we
would be able to enforce the patents and confine the busi-
ness to our licensees.

Q. Did you state to Mr. Swanson, or any other mem-
ber of the committee, that so long as there were no viola-
tions of the contract, that is to say, the exchange license
agreement, it would remain in existence during the life
4 of the patents held by the Motion Picture Patents Com-
pany, as long as they had to run? A. No, sir.

Q. Will you turn, Mr. Dyer, to page 819 of the record,
and read first, the last question on page 818, and the first
two questions and answers on page 819? A. (Witness
reads): I have read this testimony.

Q. Mr. Fox testifies that he signed the Edison sales
contract under the assurance that the provisions of Para-
graph 2 as to renting only to exhibitors handling licensed
films, prohibiting the sale of films under any circum-

stances, would never be enforced. Do you know whether
any such assurance was given by the Edison Company to
Mr. Fox, or his licensed exchange, or any other licensed
exchange? A. I certainly never gave him any such as-
surance, nor was anyone authorized by the Edison Company
to give him that assurance. As a matter of fact, my present
recollection is that during the period of the Edison licenses,
we were pretty generally successful in preventing infringe-
ments by the exhibition at our licensed theatres of in-
fringing films. I think this particular provision was car-
ried out, certainly by almost all of the theatres.

Q. Will you turn to page 1249 of the record, and read
that? A. (Witness reads): Yes, sir.

Q. Lodge there testifies that he attended some meetings
of the Edison licensees, at which the formation of the
General Film Company was discussed. Are you familiar
with the transactions that led up to the transfer of the
Melies license to the George Melies Company of Chicago, of
which Lodge was Vice-President? A. Yes, I think my
recollection is fairly clear on that point.

Q. Do you recall about the time the Edison license
held by Melies was assigned to the George Melies Com-
pany? A. It was some time before December, 1908. Posi-
sibly October.

Q. Do you recall when the assignment of the license
became effective—what date? A. No, sir. I don't remem-
ber that, except that it was before the formation of the
Patents Company.

The Examiner: Mr. Caldwell, would it be con-
venient for you to hold a little longer at this ses-
sion? We began about twenty minutes into this
morning.

Mr. CALDWELL: Well, I should like to send to
the office for a record, and if convenient, I would
like to adjourn here.

The Examiner: Very well. We will adjourn
until 2:30.

Whereupon, at 12:30 P. M., the hearing is adjourned
until 2:30 P. M. of the same day, at the same place.

1 NEW YORK CITY, November 13, 1913.

The hearings were resumed pursuant to adjournment at 2:30 P. M., November 13, 1913, at Room 159, Manhattan Hotel, New York City.

The appearances were the same as at the morning session.

Thereupon FRANK L. DYER resumed the stand.

Mr. CALDWELL: Please read the last question and answer.

2 The questions last put to the witness and the answers thereto were read as follows:

"Q. Do you recall about the time the Edison license held by Melies was assigned to the George Melies Company? A. It was sometime before December, 1908. Possibly October.

"Q. Do you recall when the assignment of the license became effective? What date? A. No, sir. I don't remember that, except that it was before the formation of the Patents Company."

8 The Witness: Add to that, "or rather before December, 1908."

Direct examination continued by Mr. Caldwell:

Q. I show you a copy of an agreement executed by the Edison Manufacturing Company, by Frank L. Dyer, President— A. (Interpreting): Vice-President.

4 Q. Yes, Vice-President; by George Melies Company, executed by Gaston Melies, as President, and also by George and Gaston Melies, individually, being "Schedule C" attached to the bill of complaint in the case of the George Melies Company, complainant, against Motion Picture Patents Company, and Edison Manufacturing Company, defendants, and George Melies and Gaston Melies, intervenors, in the Circuit Court of the United States, District of New Jersey, this agreement being found on page 31 of the transcript of the record in that case in the United States Circuit Court of Appeals for the Third Circuit, and ask you to look at the date of that agreement, and see if it reimburses your memory as to the exact time when George Melies Company became a licensee

of the Edison Manufacturing Company? A. On November 2, 1908.

Q. Does that refresh your memory? A. Yes, sir.

Q. Then you are prepared to state that the George Melies Company became a licensee on November 2nd, 1908? A. Yes, sir.

Q. Did Mr. Lodge attend any meeting whatever of the so-called Edison licensees between November 2nd, 1908, and December 18th, 1908, at which the Motion Picture Patents Company's licensees were executed? A. He did not. I remember very well that when he was present at the meeting of December 18th, 1908, I had to introduce him to the other gentlemen present.

Q. Did you hear any discussion at that meeting on December 18th, 1908, of the proposition to organize a film rental company to be maintained and conducted by the licensed manufacturers and importers? A. I did not. That meeting was occupied altogether in considering the license agreements.

Q. Did Mr. Lodge attend any subsequent meeting of the licensed producers and importers of the Motion Picture Patents Company? A. Yes, sir. He was present at a meeting, I think, in January of 1909, where several of the licensees were present, and at that meeting we discussed the possibility of adjusting the difficulties between the Carter-Lodge interests on the one side, and the Melies interests on the other, and that particular meeting was confined entirely to the discussion of this particular question.

Q. On that occasion was there any discussion whatever between you and Lodge, or between Lodge and anyone else in your hearing, relative to the possibility of the formation of an exchange to be conducted or controlled by the licensed producers or importers? A. There was not. This question was not discussed, or, at least, I knew of no discussions until a long time afterwards, and shortly before the General Film Company was formed.

Q. I show you Petitioner's Exhibit No. 24, at page 77 of the record, the same being Exchange Bulletin No. 18, dated December 4, 1909, signed by the Motion Picture Patents Company, and ask you to look at that exhibit, and see if you recall the circumstances which gave rise to the issuance of that bulletin? A. Yes, sir; I wrote this bulletin myself.

Q. And what were the occasions that gave rise to your

1 writing it? A. The fact that we had received complaints at
the office of the Patents Company from exchanges that they
had been led to believe that unless they acquired films of
certain licensed producers, those licensed producers would
start up exchanges in competition with them, and I think
that at the same time we considered complaints that had
been brought to the attention of the Patents Company from
theatres that if they did not use the service of certain ex-
changes, competing theatres would be starved in opposition
to them. The first complaint I remember very well, but
whether the second complaint was acute at that time and
required notice in this particular bulletin, I am not able to
state, but that was the rumor that had been frequently
brought in to us, and it was felt important that both of
these rumors should be effectively stopped.

Q. At the time you wrote that bulletin originally was
there any thought in your mind that the licensed producers
and importers would ever organize exchanges of their own?
A. Absolutely none. I am able to state without qualification
that the suggestion of the General Film Company, or any
similar organization, had not been made to me, and was not
known to me at that date, that is, December 4, 1909.

Q. It is alleged in Subdivision 3 of the petition that the
defendants in this case determined to destroy competition
between them, to monopolize commerce relating to the motion
picture art, to exclude all others, and thereafter to carry
on said commerce according to the terms of the unlawful
combination which they were to create. Did you either indi-
vidually, or any of the defendant corporations with which
you were connected at that time as an officer, or any officer
of any corporation with which you were connected, or to
your knowledge any of the other defendants, ever determine
or intend or purpose to do any such thing? A. No, sir.

Q. The petition further charges that the defendants were
to organize the Motion Picture Patents Company for this
purpose. By whom was the Motion Picture Patents Com-
pany organized? A. By the Edison and Biograph companies.

Q. And was it for any such purpose as that alleged in
the petition? A. It was not.

Q. It is alleged in the same subdivision of the petition
that the Motion Picture Patents Company was to acquire all
patents owned by the defendants, and all other patents re-
lating to the motion picture art. Was there any such pur-

pose or intention on the part of the organizers of the Motion
Picture Patents Company? A. No, sir. We sought only to
acquire the patents that were being infringed and that re-
sulted in patent suits.

Q. It is further alleged in the same subdivision of the
petition, page 10, that the intent of the defendants in form-
ing the Motion Picture Patents Company, and in entering
into the license agreements, was to control, restrain and
monopolize all branches of commerce among the States of
the United States and with foreign nations, relating to the
motion picture art, and to exclude others therefrom. Did
you, either individually, or any of the companies represented
by you, or to your knowledge, any of the other defendants,
have any such intention or purpose in the organization of the
Patents Company, or in entering into the license agreement?
A. We did not.

Q. Mr. Dyer, at the time you reached an agreement with
the Biograph interests, as to which you have already testified,
and prior to the formation of the Patents Company, did you
take into consideration the matter of the issuance of cross-
licenses by which each patent owner might license the other
interests under his patents? A. We considered and dis-
cussed that possibility.

Q. You have already stated that it was attended with
difficulties, have you not?

Mr. GROSVENOR: What was? I object to that.

Mr. CALDWELL: That any system of cross licensing
was attended with difficulties?

The Witness: We did not see how the matter could be
worked out feasibly by a system of cross licenses.

By Mr. CALDWELL:

Q. State what difficulties you found of cross licensing.

Mr. GROSVENOR: Objected to as wholly immaterial;
further, on the ground that the business difficulties
which defendants may have encountered in an effort
to arrive at a legitimate and legal cross licensing ar-
rangement forms no excuse for not entering into such
an arrangement, or for forming an arrangement and

1 combination that violated the law, and therefore the question as to why they didn't do something else is immaterial.

Mr. CALDWELL: The Government, in its petition, makes very material the organization of the Patents Company, and alleges that it was formed for an unlawful purpose. The motives of these defendants in organizing that company are therefore material to the issues raised by the Government in its own petition.

Mr. GROSVENOR: But you are asking him here about why he didn't do something else. That is the ground of my objection.

Mr. CALDWELL: For the simple reason that you have contended that the same result could have been accomplished by a system of cross licenses, and that has been your contention.

Mr. GROSVENOR: This is the first time that cross licenses have ever been mentioned, to my recollection, in this record.

8 The Witness: At the time we discussed these matters with the Biograph Company the situation was this: The Edison Manufacturing Company owned patents on the only known form of camera, or, at least, the camera that was universally used at that time, and also a patent on the motion picture film which we asserted and believed covered every motion picture film made in or imported into this country. These were the primary dominating patents.

4 Mr. GROSVENOR: I object to these conclusions of the witness as being improper, not called for, and not in response to the questions addressed to him, and certainly an attempt to put into the record in an improper way what is not so, this so-called dominant patent on the film having been at that time held invalid, and no suits having been brought thereon for five or six years prior to the formation of the Edison License Association, as testified to by Marvin, one of the defendants in this suit.

Mr. CALDWELL: I protest against counsel for the petitioner interposing his argument upon the record, and testifying. He is entitled to make his objection

and state it on the record. If the objection is good, the Court will probably sustain it. If it is bad, the Court will disregard it. Now, you may proceed, Mr. Dyer.

Mr. GROSVENOR: I want to make my objection on the record to this improper way of conducting this equity proceeding by getting this witness to give a lecture, instead of conducting it by proper questions and answers, as counsel knows is the right way to do it.

8 The Witness: The Biograph Company owned the Cross and Latham patents, which covered important and necessary details in the construction of the projecting machines. The Armat Company owned the Armat-Jenkins patent, which covered the shutters used in all projecting machines at that time, and was therefore of vital importance to the legitimate practice of the art. There were, therefore, three separate and distinct licensors. Aside from these licensors there were the following groups of licensees and infringers:

8 In the first place, there were the Edison licensees, who were licensed under the Edison patents, but those licensees were not licensed under the Biograph and Armat patents, and therefore the sale of film by them for use on infringing projecting machines in the United States would have been a contributory infringement.

Mr. GROSVENOR: All my objections I made above apply to all this line of testimony and examination.

Mr. CALDWELL: I will agree that at the termination of Mr. Dyer's answer to this question you can put any objection that you want to make on the record, if you will only refrain from interrupting him during the course of his answer.

4 Mr. GROSVENOR: And I further object to the last sentence for the reason that the statement is that such and such would have been unlawful if they had done such and such, which is manifestly improper testimony; it is not testimony to any fact. If you want to change that to a statement of fact, I will withdraw the last part of my objection.

The Witness: I will go on.

1 Mr. GROSVENOR: All right.

The Witness: Therefore, to have licensed this group of infringers would have necessitated a license from the Armat and Biograph Companies under the Latham and Pross, and Jenkins-Armat patents.

The second group was the so-called Edison licensed ex-
patents, who were licensed to handle films under the Edison
patents, but had not been licensed to handle films under the
Biograph and Armat patents. These exchanges, in handling
films for use on infringing projecting machines, would also
be contributory infringers on the Latham, Pross, and Jen-
kins-Armat patents, and therefore these exchanges would
similarly have had to be licensed by the Biograph Company
under the Latham and Pross patents, and by the Armat
Company under the Armat-Jenkins patent.

The third group were the so-called licensed theatres,
which were licensed under the Edison patents, but which
in showing film on infringing projecting machines, were
infringing the patents of the Biograph and Armat com-
panies, and, therefore, these theatres, in order to be free
from infringement, would similarly have had to be licensed
by the Biograph Company under the Latham and Pross
patents, and by the Armat Company under the Armat-Jen-
kins patent.

The fourth group were the manufacturers of projecting
machines, who were selling such machines in infringement
of the patents of the Biograph and Armat companies, and
these concerns also would have had to be licensed by the
Biograph Company under the Latham and Pross patents,
and by the Armat Company under the Armat-Jenkins pa-
tent, and possibly, also, by the Edison Company under the
Edison film patent.

The fifth group was the Biograph Company, and its
licensees, producers and importers of infringing films. While
the constituents of this group would be licensed under the
Latham and Pross patents, they would then, in carrying on
their operations, infringe the Edison patents, and, there-
fore, would have had to be licensed by the Edison Com-
pany under the Edison patents, and in supplying film for
use on infringing projecting machines, they would have

had to be licensed by the Armat Company under that
patent.

The sixth group were the exchanges handling the film of
the Biograph Company, and its associates, which group,
although licensed under the Latham and Pross patents,
would be directly infringing the Edison film patent, and
would, therefore, have had to be licensed by the Edison
Company under that patent, and in disposing of film to
theatres for use on projecting machines infringing the
patent of the Armat Company, and would have had to be
licensed by the Armat Company under the Armat-Jenkins
patent.

And finally, the seventh group, including the so-called
independent theatres, who were receiving film of the Bi-
ograph Company and its associates, and the constituents of
this group, although licensed under the Latham and Pross
patents, would directly infringe the Edison film patent,
so that they would also have had to be licensed by the Ed-
ison Company under the film patent, and they would also
directly infringe the Armat-Jenkins patent, and so they
would have had to be licensed by the Armat Company, un-
der that patent.

Now, in discussing this question, we realized that the
granting of these licenses would necessarily involve many
thousand separate licenses from the various groups of li-
censors to the various groups of infringing manufacturers,
exchanges, and theatres, so that the difficulty of providing
such licenses was very great, and the difficulty in enforce-
ing such a very complicated system of licensing would be
extremely difficult; but the insuperable difficulty which
confronted us was the fact that if the three licensors acted
independently, and without co-operation, that it would be
impossible to get any order out of the chaos which the situa-
tion presented. Each licensor considered its patents as
valuable, if not more so, than the other licensor, and each
wanted to get just as much in the way of royalties as
could be gotten. We felt that to leave these three licensors
to independently negotiate licenses with these conflicting in-
fringing groups would be an impossibility, and that there
would have to be some understanding and co-operation among
the three licensors, by which there could be a fair division of
the royalties. Unless there was some co-operation, as I have
stated, it seemed to us, and I still feel, that the solution

- 1 would have been absolutely impossible. If there could be co-operation among the three groups of licensors on the subject of collecting and dividing the royalties, we felt that that co-operation could be best secured by means of a company that would act as a single licensor, that would provide for the granting of all the licenses required, that would provide for the collection of all the royalties, and that would provide for the division of these royalties among the three licensors in the proportions they had agreed upon, was fair and equitable under all the circumstances of the case. While, therefore, the system of cross licensing as discussed by us, might have been theoretically possible, it seemed to us to involve practically a reasonable impossibility, and, therefore, the suggestion of a single licensor to take the patents seemed to us to be an acceptable and reasonable solution of our difficulties.

By Mr. CALDWELL:

- Q. The petition, in Paragraph 5, alleges that with the same unlawful purpose, each of the ten manufacturers theretofore referred to, entered into the license agreement with the Patents Company on December 18, 1908. Did you, or any of the companies represented by you, or any of the other defendants, to your knowledge, have any such purpose or purposes as those alleged in the petition, in entering into this license agreement? A. No, sir, we did not.

- Q. The same allegation of unlawful purpose and intent is contained in Subdivision 8 with respect to the execution of license agreements, with the manufacturers of exhibiting machines. Were these agreements, or any of them, made with the intent or purpose alleged in the petition, or as means to monopolize the trade? A. No, sir.

- Q. In Subdivision 9, on page 27, the petition alleges that the defendants set out to monopolize the business at all the rental agencies, or exchanges, in the United States, their purpose being to drive out of business all persons so engaged, and to absorb to themselves the profits theretofore made therein, and that this unlawful end was accomplished by means of the General Film Company. Are these allegations of the petition true? A. No.

- Q. Was the General Film Company organized for any such purpose? A. It was not.

- Q. In Subdivision 11, page 34, of the petition, it is alleged that with the same unlawful purpose, each of the ten Patents Company licensees executed an agreement with the General Film Company, to supply the latter with film. Were these agreements executed for the purpose alleged in the petition? A. No, sir.

Mr. CALDWELL: I think that is all.

Mr. GROSVENOR: Are you through with him entirely?

Mr. CALDWELL: I am through with him entirely. When would you like to cross examine him?

Mr. GROSVENOR: I will cross examine him Monday, if you like.

Mr. CALDWELL: Well, without establishing a precedent which seems to be a departure from our usual custom in these hearings, I will consent that you may defer or postpone your cross examination of Mr. Dyer until Monday.

Mr. GROSVENOR: I think that has been the regular practice. You have not cross examined anybody—

Mr. CALDWELL: (interrupting): You held us pretty strictly to the rule which you yourself laid down, I believe, at the outset of the hearings, that the cross examination of a witness should be commenced on the day following his direct examination.

Mr. GROSVENOR: I will cross examine you, Mr. Dyer, tomorrow, if you will be here, at 10:30 o'clock.

The Examiner: You are excused until that time, if you care to go, Mr. Dyer. Who is the next witness?

Mr. KINGSLEY: Will you take the stand, Mr. Hardin, please?

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA,
Petitioner,

v.

MOTION PICTURE PATENTS Co. and others,
Defendants.

No. 885.

Sept. Term, 1912.

NEW YORK CITY, November 14, 1913.

The hearings were resumed pursuant to adjournment at 10:30 A. M., November 14, 1913, at Room 159, Manhattan Hotel, New York City.

Present on behalf of the Petitioner, Hon. EDWIN P. GREENEVOLD, Special Assistant to the Attorney General.

J. B. DARLING, Esq., Special Agent.

Present also, MORRIS CHARLES F. KINGSLEY, GEORGE R. WILLIS and FRANK R. WILLIAMS, appearing for Motion Picture Patents Company, Biograph Company, Jeremih J. Kennedy, Harry N. Marvin and Armat Moving Picture Company.

Mr. J. H. CALDWELL, appearing for William Pelzer, General Film Company, Thomas A. Edison, Inc., Kalem Company, Inc., Pathé Freres, Frank L. Dyer, Samuel Long and J. A. Berst.
Mr. HENRY MCVILLIE, attorney for George Kleine, Essanay Film Manufacturing Company, Selig Polyscope, George E. Spoor and W. S. Selig.
Mr. JAMES J. ALLEN, appearing for Vitagraph Company of America, and Albert E. Smith.

1 Thereupon, FRANK L. DYER resumed the stand.

Cross examination by Mr. GROSVENOR:

Q. Mr. Dyer, you have stated on direct examination that you were general counsel for Mr. Edison from April, 1903, to July, 1908; is that correct? A. Yes, sir.

Q. Are you a member of the Bar of New York State? A. No, sir. I am a member of the Bar of the District of Columbia.

Q. You are not licensed to practice law in the State of New York? A. No, sir, not before the State Courts.

Q. You were general counsel for the Edison Company during this period of warfare in the early part of 1908 between the Edison Manufacturing Company and the Biograph Company? A. Yes, sir, although I became the Vice-President of the Edison Manufacturing Company in July, 1908, and thereafter devoted myself entirely to commercial matters.

Q. You testified at the beginning of your examination rather generally as to the litigation prevailing in the years prior to the formation of the Patents Company. Have you any memoranda, or have you refreshed your recollection by

8 looking up the dates as to these various suits, so as to be able to testify more specifically in regard thereto? A. No, sir, but I remember the circumstances fairly well, but not the exact dates.

Q. The first suit against the Biograph Company brought by the Edison Company on patent No. 569,168, which was the patent embracing both the camera and the film patents, was decided in the Circuit Court of Appeals of the Second Circuit against the Edison Company in March, 1902, was it not? A. I think it was about that date.

Q. And subsequently you obtained, and I mean by "you" the Edison Company, obtained releases, one release on the camera claims, and another release, which was No. 12,038, and, subsequently, No. 12,192, on the film claims? A. Yes, sir.

Q. In that first decision of Judge Wallace, in 1902, you recall that the decision was against Edison's claims on the film, is that correct? A. The decision was to the effect that the claims were too broad, and that the claims under the original patent were broader than the Edison invention.

Q. Can you point to any decision in the six years that

1 elapsed, or the six and a half years that elapsed, between November, 1902, and the formation of the Patents Company in December, 1908, in which the film patent was sustained? A. No, sir, I don't think there was any decision.

Q. You have testified as to the litigation between the Biograph Company and the Edison Company after the decision in 1902, in which the film claim of Edison was cast aside by the Court. Did you bring any suit, any subsequent suit, against the Biograph Company until the Spring of 1908, when the Biograph Company had refused to join with the Edison licensees, and then you commenced suit against them? A. Yes, sir, my recollection is that—

Mr. KINOSLER (interrupting): I object to the form of the question to the extent of the last clause, "and then began suit against the Biograph Company."

Mr. GROSVENOR: I will change the form of the question.

Mr. KINOSLER: The inference being that on the refusal of the Biograph Company to come in and become an Edison licensee the suit was brought.

Mr. GROSVENOR: I will change the question.

By Mr. GROSVENOR:

Q. From March, 1902, when Judge Wallace handed down that opinion in the Circuit Court of Appeals, in this Circuit, up to February, 1908, had you brought any suit on your film patent release, or on your film claims, against the Biograph Company? A. Yes, sir, we had.

Q. What was the date of such a suit? A. My impression is that two suits were simultaneously brought against the Biograph Company, one on the camera release No. 12,037, and the other on the film release No. 12,038, and that it was because of the knowledge that the Biograph Company would interpose the defense that the release No. 12,038 had actually broadened the scope of the claims, instead of narrowing them, that the second release No. 12,192 was granted.

Q. No. 12,038 was the first release of the film patent after the opinion of Judge Wallace? A. Yes, sir.

Q. Is it not a fact that you brought suit on that release No. 12,038, November, 1902, and that the suit was discontinued on January 12, 1904? A. I think that is so.

1 Q. And it was about that time that the release No. 12,088 was abandoned, and you got another release on the film claims, namely, No. 12,192? A. Yes, sir, I think the second film release was granted in 1904.

Q. Mr. Dyer, had you brought any suit against the Biograph Company on the film patent release No. 12,192, from the time of its issue, dated January 12, 1904, up to February, 1904, when those Edison licenses were issued? A. I was under the impression that we had brought suit against the Biograph Company on the release No. 12,192, some time before February, 1905, but if that is the date when the suit was brought then I know of no such other suit brought against the Biograph Company between those dates.

Q. I am not asking you as to your impressions, Mr. Dyer. Can you testify whether or not the Edison Company brought any suit against the Biograph Company before the formation of the so-called Edison License Association? A. I was of the belief that the suit against the Biograph Company had been brought earlier than you have stated, but the only suit on this patent that was brought against the Biograph Company was the one that was pending in the Summer of 1905, and, therefore, if that is the suit that was filed in February, 1905, then I do not know of any suits that were brought between January, 1904, and February, 1905, on that point.

Q. You were the general counsel for the Edison Company at that time? A. Yes, sir, but these patent suits, you understand, were handled by separate patent counsel. Mr. Bull was in charge of these suits, and he knew more about them than I did.

Q. Can you answer, Mr. Dyer, frankly, yes or no, whether the Edison Company had or had not brought suit against the Biograph Company on release No. 12,192, before the Biograph Company refused to join in with the Edison licensees? A. Not any more fully than I have. I have stated that if that is the date when that suit was brought then I know of no suit. In other words, I am quite confident that two suits were not brought.

Q. You did not, then, on your direct examination by your counsel, intend to give the impression that you were in litigation with the Biograph Company on the film patent prior to March, 1905? A. No, sir.

Q. Now, the Biograph Company was your principal competitor, was it not? A. In the early days they were, but later on other competitors came in, principally Pathé.

Q. But the Biograph Company was one of your principal competitors in the year 1904, and to the year 1905? A. Yes, sir.

Q. During that time the Biograph Company was manufacturing and selling positive motion picture films, was it not? A. Yes, sir.

Q. And during that period of four years you brought no suit against that company, upon that film release No. 12,192, did you? A. I don't think we did, no, sir.

Q. It is a fact that you didn't bring any suit during that period of four years against the Biograph Company on release No. 12,192? You know that? A. Mr. Grosvenor, I am not trying to evade your question. The only doubt I have is as to the date when the film suit was brought.

Q. Don't you know, Mr. Dyer, that you did not sue the Biograph Company on release No. 12,192, until after they declined to join in with the other Edison licensees? Now, don't you know that that suit was subsequent to their refusal? A. I don't know that I don't remember the date, but if that is the date, then it is a fact, because they had refused to accept a license by the first of February.

Q. You testified as to litigation on the Latham patent. Isn't it true, Mr. Dyer, that prior to the formation of the Patents Company, and the merging of the different patents in that holding company, you, as general counsel for the Edison Company, had scoffed at the claim made under the Latham patent? A. I had sneered at it.

Q. When was the Latham patent issued? A. I think in 1902.

Q. When? A. In 1902, I think.

Q. Do you know Mr. H. N. Marvin? A. Very well.

Q. During this period from 1904 to 1905, he had been one of the principal officers of the Biograph Company? Is that not the fact? A. Yes, sir.

Q. And isn't it a fact, that during that period, he had scoffed at your pretense, or any pretensions under the film patent? A. I think so. That was a customary thing in business circles, to depreciate the patents of your competitors, and glorify the patents of your own.

1 Q. The Biograph Company did not buy the Latham patent until after the formation of the Edison licensees, did it? A. I don't think they did, but I am not positive.

Q. In any event, no suit was brought against the Edison Company on the Latham patent, until after the formation of the Edison licensees? A. No, sir.

Q. And the Edison Company for many years had used the so-called loop on its projecting machines, and cameras, had it? A. We had been infringing this patent, yes, sir.

2 Q. I say you had been using the loop on your cameras and projecting machines, for many years? A. That was the purport of my answer, yes, sir.

Q. And no suit had been brought against you, had it? A. No, sir.

Q. Mr. Dyer, do you recall making a statement in regard to the Latham patent to the representatives of the Show World, which was subsequently published in the Show World of April 4, 1908, being printed in the Show World of April 4, 1908, at page 11? It is also printed in Dyer's testimony in another suit, numbered 5-187, Vol. 2, page 170. I think that is the suit under the Latham patent.

3 I have not either of those with me.

Mr. CALDWELL: I think that is in our record. Can you give us the page of the record?

By Mr. GROSVENOR:

Q. Please look at that statement, and see whether that refreshes your recollection as to your making such a statement to the representatives of the Show World about the time indicated?

4 Mr. GROSVENOR: Where does it appear in the record, Mr. Seull?

Mr. SEULL: I will find it in a moment.

Mr. GROSVENOR: I thought I had put it in.

Mr. KINGSLAY: I want him to testify the page and volume he has there, and what suit it is in.

Mr. GROSVENOR: I will do that in a moment.

The Witness: Please read the question.

The question was read as follows:

"Mr. Dyer, do you recall making a statement in regard to the Latham patent to the representatives of the Show World, which was subsequently published in the Show World of April 4, 1908, being printed in the Show World of April 4, 1908, at page 11? It is also printed in Dyer's testimony in another suit, numbered 5-187, Volume 2, page 170. I think that is the suit under the Latham patent. I have not either of those with me."

Mr. CALDWELL: What other suit, may I ask?

Mr. GROSVENOR: In the suit in the Circuit Court of Appeals, or the Circuit Court here; it is in Volume 2 of one of those suits Kenyon & Kenyon brought against you. This suit is the record in the Greater New York Film Rental Company.

By Mr. GROSVENOR:

Q. Just refresh your recollection by this (passing witness some papers) and I will ask you the question.

Mr. CALDWELL: For the purpose of the record, the suit of the Greater New York Film Rental Company against the Biograph Company, and the General Film Company?

Mr. GROSVENOR: I will show you it in a moment, and then you can make such statement as you wish.

The Witness: (after examining paper) Yes, I recall this article, and of having made those general statements.

Mr. KINGSLAY: In this record it is Petitioner's Exhibit No. 173, at page 980, of the record, Vol. 2.

By Mr. GROSVENOR:

Q. Now, witness, I show you the same article again, being Petitioner's Exhibit No. 173 in this case, printed in the record at page 980. Please look at that, and see if that is a statement made by you? A. Yes. I have already stated that I recalled this article, and remember having made the statement, or those general statements at the time.

1 Q. In this interview you characterized the Latham patent as a "joke" in the business, did you not? A. I did at that time, yes, sir.

Q. You say in this article also: "I have been familiar with this patent ever since its issue." Is that a true statement? A. Superficially considered, yes, sir.

Q. You also stated: "I at one time looked into the Latham patent in the hope that I might be able to persuade myself that it possessed value, but I could not see anything in it." Did you make statements to that same effect about that time? A. At that time I did, yes, sir.

2 Q. You say: "According to the people who are now affirming its validity, it has been infringed by everyone since August 26th, 1902, when it was issued." Who were the people that were affirming its validity at the time you made this statement in April, 1908? A. I think the Biograph Company were doing that.

Q. Who had acquired the patent about that time? A. I don't remember when they acquired the patent, but I think they acquired it shortly before that time.

Q. That is, shortly before the date of that interview? A. Yes, sir.

3 Q. Had the patent been infringed by everyone since its issue in 1902? A. So far as I know, it had. That is, when I say "everyone," you understand, I mean people in the moving picture business.

Q. You refer there in your statement, also, to trouble Latham had by reason of an interference with Thomas Armat, and you say that "The Court of Appeals of the District of Columbia decided in that interference that Armat and not Latham was the first inventor." As a result of this controversy all that Latham was able to obtain from the

4 Patent Office was a very limited patent? Did you make that statement about that time? A. That was the cause of the error in my statement. I was under the belief that Armat was the first inventor, but subsequently found that Latham antedated Armat.

Q. And you made this remarkable discovery about the time you and the Biograph Company came together, and you began to try to enforce the Latham patent? A. No, sir.

Q. When did you make that discovery? A. I think Mr.

1 Marvin told me I was wrong in my belief as to the facts as to the question of the priority of invention between Armat and Latham.

Q. Did Mr. Marvin call to your attention any decision of the Court upholding the Latham patent? A. Not at that time, but later Judge Cox, in this Circuit, found that Mr. Latham was the primary inventor.

Q. Are you frank in your last answer, Mr. Witness? A. I try to be always frank.

Q. Was that opinion of Judge Cox a dissenting opinion? A. It was.

2 Q. It was not the opinion of the Court, was it? A. No, sir.

Q. Then, when you say that Judge Cox found such and such, you mean to say he filed a dissenting opinion, disagreeing with the majority of the Court? A. I mean Judge Cox, in investigating the question of priority between Armat and Latham, decided that Latham antedated Armat. The decision of the Court was purely on the question of the scope of the patent but not as to its validity.

3 Q. And the decision of the Court was against Judge Cox, the decision of the majority of the Court? A. Only on the question of the scope of the patent. The Court did not consider the question of validity but assumed the patent to be valid, and held it was not infringed by the camera. In other words, that the claims were not broad enough to include a camera.

Q. In other words, the Court held that the Latham patent did not apply to a camera, was that it? A. Yes, sir, that was it.

4 Q. Now, witness, you testified generally yesterday in regard to the purposes in forming the General Film Company. Are you a director of the General Film Company? A. Yes, sir.

Q. Have you been one of the directors since its formation? A. Since the first meeting of the stockholders.

Q. And you represented the Edison Company in your connection with the General Film Company? A. Up to about December, 1912, I did, yes, sir.

Q. Then in the negotiations or conferences which resulted in the formation of the General Film Company you participated as a representative of the Edison interests? A. Yes, sir.

1 Q. I want to direct your attention to the following testimony in the record, first, at page 257, Petitioner's Exhibit No. 78, being a letter addressed by J. J. Kennedy to William Pelzer, Secretary, dated January 23, 1912, in which this statement is made:

"Dear Sir: Sometime before the General Film Company was organized, an estimate of the value of the business of exchanges leasing licensed motion pictures was made by men familiar with the manufacture of motion pictures, and also with the business of exchanges.

2 "According to this estimate, the value of said business was \$3,498,847." And I will direct your attention to Petitioner's Exhibit No. 80, Record, page 272, being the minutes of a regular meeting of the Board of Directors of the General Film Company, held at 10 Fifth Avenue, New York City, October 11th, 1910, at 4:30 P. M. "Present, Messrs. Kennedy, Berst, Dyer, Kleins, Long, Lubin, Selig, Smith, Spoor, and Pelzer, Secretary.

"Mr. Kennedy reported on behalf of the Executive Committee that the Company had purchased 39 exchanges, and made the following detailed report of conditions as of October 10, 1910:

3 "Number of Licensed Exchanges in entire country, including Yale Company of St. Louis, 59.

"Owned by General Film Company, 39.

"Not owned by General Film Company, 20.

"Percentage of Exchanges owned by General Film Co., 66%.

"Percentage of business of entire country controlled by General Film Company, based on reels, 71%.

"Payments authorized for exchanges owned October 10th, Stock \$501,400, Cash \$1,483,200.

4 "Prices—actual—including interest amounting to \$90,500, Stock \$335,900, cash \$1,269,000; Saving \$55,500 stock, and \$113,000 cash.

"Total payments authorized for all exchanges in entire country, Stock \$380,800, Cash \$2,480,000."

Now, Mr. Dyer, when was that authority given by the Directors of the General Film Company naming this figure, which in stock and cash aggregates \$3,498,800, for all exchanges in the entire country? A. I have no recollection of authority ever having been given by the Directors.

Q. How did that figure and that statement get into the

minutes of the Directors as a statement of the fact, namely, that authority had been granted, if authority had not been granted? A. I would like to say, in the first place, that the letter referred to in the previous question from Mr. Kennedy to Mr. Pelzer, is a letter I know nothing of until my attention was directed to the fact that it had been introduced in this case; and I know nothing about any estimate having been made prior to the organization of the General Film Company, as Mr. Kennedy states.

Q. Mr. Kennedy was the President of the General Film Company at the time that letter was written, was he?

Mr. KINGSLEY: Look at page 252.

The Witness: Yes, he was the President.

By Mr. GROSVENOR:

Q. And who was Mr. Pelzer, to whom the letter was addressed? A. Secretary of the company at that time.

Q. Mr. Kennedy had been President of the company from the date of the formation of the company up to and after the date of that letter? A. Yes, sir.

Q. And Mr. Kennedy was the man who, on behalf of the General Film Company, conducted the negotiations resulting in the purchase of the several exchanges? A. I think he had largely to do with that particular work. That is, he had more to do with it than any other officer of the General Film Company.

Q. Now, going back to my question that you have not answered. A. Please read the question.

The question was read as follows:

"How did that figure, and that statement, get into the minutes of the Directors as a statement of the fact, namely, that authority had been granted, if authority had not been granted?"

A. (continuing): I can only state that I recall Mr. Kennedy having read this statement, or having stated the effect of the statement at the meeting in question, but I do not recall any meeting of the Board where any authority along the lines suggested in his report was given.

- 1 Q. Isn't the fact that the figure he names as having been authorized to be paid for the branches of all the exchanges is exactly the same as the figure he names in his letter as being the estimate made before the General Film Company was organized as to the value of all exchanges?

Mr. KINGBLET: I suggest that the witness be given a piece of paper so that he can add up those columns.

Mr. GROSVENOR: First look at page 272 of the record—

- 2 The Witness: I have that in mind.

By Mr. GROSVENOR:

Q. What is the figure Mr. Kennedy says was the original estimate on January 23rd, 1917? A. According to the estimate the value of the business was \$3,468,847.

Q. What is the figure that he names in the minutes of October 11th, 1917? A. Adding the amount of stock to the amount of cash the result is \$3,468,800.

- 3 Q. Then there is a difference of \$47 only? A. Yes, sir, in those two statements.

Mr. KINGBLET: What was that figure; was it \$3,268,007?

The Witness: \$3,468,800.

Q. I call your attention to Petitioner's Exhibit 83, page 278 of the record, being the minutes of a regular meeting of the Directors of the General Film Company, held at 80 Fifth Avenue, New York City, January 10th, 1911, at 4 P. M. Present, Messrs. Kennedy, Berat, Dyer, Kleins, Long, Lubin, Selig, Spoor and Peltzer, Secretary. Also Messrs. Blackton, Marvin, Paul Melies and Rock, and so forth. Then it says that Mr. Kennedy made the following report of the business obligations, and so forth. Now, here are the words: "Cash to be paid in installments, \$1,000,000.00; interest, \$100,853.00; seven per cent. stock, \$946,250.00." Then, "Original estimate of exchanges not bought, but still licensed, \$351,800.00, and seven per cent. stock, \$140,100.00." Did you ever see this original estimate, Mr. Dyer? A. No, sir; I saw no estimate

at all. The only statement I recall in connection with this matter is the minutes of the former meeting that we were talking about, and although I am indicated as President at that meeting you just read, and undoubtedly was President, I do not recall the figures given at that meeting.

Q. As a matter of fact, Mr. Dyer, whether or not the purpose existed prior to the formation of the General Film Company by the organizers of the General Film Company to acquire all the licensed exchanges, the fact is that eighteen months or thereabouts after the formation of the General Film Company, all these licensed exchanges had passed out of existence either by reason of the purchase by the General Film Company, or the cancellation of their licenses, except the one licensed exchange, the Greater New York Film Rental Company? A. I do not recall when the last exchange was taken over, but it is a fact that for some time, and probably from some time as far back as 1911, the exchanges which formerly were in business, or rather, were in business at the time the General Film Company was organized, sold their films to the General Film Company, which thereafter handled them, but I do not think the identity of those exchanges ended. I think that some of them are still in existence now without doing any business; in other words, the exchanges were not terminated, but the supply of film was bought, because I know—my recollection is very clear that the payments that we are making now on the goods bought at that time, some of the payments, are made to former exchange names.

Q. Do you consider that last answer of yours a frank and truthful statement? A. My statements are always truthful, Mr. Grosvenor, and I try to be as frank as I can. I am trying to answer your questions without reservation at all, and I think that your question implied that the exchanges had actually ceased and terminated, and I wanted to make it perfectly clear that I did not think that was so, although I am willing to admit that for all practical purposes, that might be so.

Q. What might be so? A. That for all practical purposes, the exchanges had terminated.

Q. Let us get at it in another way, Mr. Dyer. After the Patents Company was organized, it licensed approximately one hundred exchanges to handle the so-called licensed film, isn't that right? A. Yes, sir.

1 Q. A year or two later the General Film Company was organized, isn't that right? A. Yes, sir.

Q. Eighteen months after the General Film Company was organized, was there one of those one hundred exchanges in the United States handling licensed film, except the Greater New York Film Rental Company? A. I am not certain about the eighteen months, but after sometime in 1911 that is quite true.

Q. Is there one of those hundred-odd exchanges that is today handling the so-called licensed film, other than the Greater New York Film Rental Company? A. No, sir.

2 Q. Now, then, you say that the purpose did not exist in the organizers of the General Film Company to acquire the business of those 100 exchanges. I understood you to so testify yesterday or the day before on direct examination by your counsel. A. The purpose did not exist in my mind, and so far as I could tell from conferences with my associates, I do not think it existed in their minds.

Q. Well, please state when the purpose was born which has resulted in the acquisition of all of those companies except the Greater New York Film Rental Company.

3 Mr. KINGSLEY: I object to the question as incompetent, also object to the form of it, as embodying a conclusion which the witness is asked to endorse.

Mr. CALDWELL: And I further object to it on the ground that it assumes the existence of a fact which has not been proven.

The Witness: Will you read the question?

The Examiner repeats the question as follows:

4 "Q. Well, please state when the purpose was born which has resulted in the acquisition of all of those companies except the Greater New York Film Rental Company?"

The Witness: I am not able to state that there was ever such a purpose born. My belief is that the exchanges came to us to sell out.

By Mr. GROSVENOR:

Q. Then you got the exchanges without having the purpose to get them, is that it?

Mr. KINGSLEY: I object to the question as being an improper characterization of the preceding answers of the witness.

The Witness: Will you read the question, please?

The Examiner repeats the question as follows:

2 "Q. Then you got the exchanges without having the purpose to get them, is that it?"

The Witness: It was not our purpose to get them when the General Film Company was formed, and I think the acquisition of the exchanges was a development which came from an initiative on the part of the exchanges, and not on our part.

By Mr. GROSVENOR:

3 Q. Going back to the Film Service Association, Mr. Dyer, and to the licenses issued by the Edison Company to the rental exchanges, the fact is, is it not, that those rental exchange licenses are issued entirely on release No. 12,192, that is, the film release patent? A. That is my recollection, but the license states. I would like to refresh my recollection on that before I answer definitely (referring to papers). Having refreshed my recollection by looking at Petitioner's Exhibit 91, that is correct.

Q. And it is true, is it not, that the rental exchange license agreement issued by the Patents Company to rental exchanges in the beginning of 1909, was also based exclusively on release letters patent No. 12,192, namely, the film patent? A. (referring to Petitioner's Exhibit No. 8): Will you read the question please?

The Examiner repeats the question as follows:

4 "Q. And it is true, is it not, that the rental exchange license agreement issued by the Patents Company to rental exchanges in the beginning of

1 1909, was also based exclusively on release letters patent No. 12,192, namely, the film patent?"

The Witness: No, sir, it is not true.

By Mr. GROSVENOR:

Q. Will you please name any patent other than No. 12,192 which the rental exchange is licensed to use in that license, Petitioner's Exhibit No. 8, that is to say, what license right is granted under the terms of that exchange agreement? A. I apologise, Mr. Grosvenor. That is correct.

Q. It is based—

Mr. KINGSLEY (interrupting): I object to the counsel for the Government using the terms interchangeably there in his question. The first question asked of the witness is whether the license is based on patent No. 12,192. Then he is asked if the license mentions any other patent, or grants any right under it, the two questions not being synonymous, although being used by the attorney for the Government as interchangeable in interrogating the witness, and intended to confuse and mislead.

Mr. CALDWELL: I further object to the question, on the ground that it calls for the construction of a written instrument which is already in evidence, and, therefore, calls for purely a legal conclusion.

Mr. GROSVENOR: The witness did not seem confused, although his counsel appears so. Now, go back to that answer, please, Mr. Examiner, where the witness apologized, and read the question and answer.

The Examiner repeats the question and answer as follows:

"Q. Will you please name any patent other than No. 12,192, which the rental exchange is licensed to use in that license, Petitioner's Exhibit No. 8, that is to say, what license right is granted under the terms of that exchange agreement? A. I apologise, Mr. Grosvenor. That is correct?"

The Witness: Let me go ahead now. The exchange license also refers to other patents owned by the Patents Company, and there would, therefore, be a question as to whether any rights by implication, were included under those patents.

By Mr. GROSVENOR:

Q. This granting clause in this exchange agreement says, "The licensor hereby grants to the licensee for the term, and subject to the conditions expressed in the conditions of the license hereinafter set forth, the license under the said released letters patent No. 12,192, to lease licensed motion pictures from the licensed manufacturers and importers, and to sublease said licensed motion pictures, only on projecting machines licensed by the licensor under letters patent owned by it." The only express license granted to the rental exchange, in the rental exchange agreement, is that contained in that clause, is it not, that is, the license under the said released letters patent No. 12,192?

Mr. CALDWELL: I object to that on the ground that it calls upon the witness to construe the contents of a written document which is in evidence, and on the further ground that the document speaks for itself.

Mr. GROSVENOR: Look at it, Mr. Dyer.

The Witness: Now, will you read the question?

The Examiner repeats the question as follows:

"Q. This granting clause in this exchange agreement says, 'The licensor hereby grants to the licensee for the term, and subject to the conditions expressed in the conditions of the license hereinafter set forth, the license under the said released letters patent No. 12,192, to lease licensed motion pictures from the licensed manufacturers and importers, and to sublease said licensed motion pictures only on projecting machines licensed by the licensor under letters patent owned by it.' The only express license granted to the rental exchange in the rental exchange agreement, is that contained in that clause, is it

1 not, that is, the license under the said release letters patent, No. 12,192?"

The Witness: No. Upon reflection, and I have been giving rather curtstone opinions to your questions—it strikes me that the expression, "to sublicense said licensed motion pictures for use only on projecting machines licensed by the licensee, under letters patent owned by it," includes the other patents.

2 Q. The other patents are not named, are they? A. Yes, sir, they are named in the first part of the license agreement.

Q. Do you think that is a frank answer? A. I resent that.

Mr. KINGLEY: I object to the witness being asked to characterize his own answer.

The Witness: My answers are always frank, and I resent the imputation.

3 By Mr. GROSVENOR:

Q. Mr. Dyer, did you have charge of the suits that were brought against the various exhibitors in the Spring of 1908 in Chicago under the film patent? A. Yes, sir.

Q. How many suits were brought under the Film Patent at that time? A. I don't recall. Quite a good number.

Q. Something over forty, weren't there? A. I don't think there were so many as forty. I thought there were in the neighborhood of thirty.

4 Q. And most of those were in Chicago? A. Yes, sir.

Q. And many of them were against theatres, weren't they? A. Yes, sir, I think they all were.

Q. This was after the conclusion of the so-called Edison licenses, and the beginning of the war between the Edison camp and the Biograph camp? A. That is correct.

Q. Had there been any period prior to this time, when you had brought a lot of suits against motion picture theatres, based on the Film Patent, and if so, when? A. I do not recall that there was any period.

Q. Were these theatres all theatres that were taking

the Kleins and Biograph service? A. That I do not recall, but they were all theatres using unlicensed film.

Q. That is to say, they were all theatres that were taking film other than that made by the so-called Edison licensees? A. Yes, sir.

Q. Theatres generally throughout the country had been displaying motion picture films from the date 1904, the date of the film release No. 12,152, down to the Spring of 1908, when these suits were brought? A. Yes, sir, that is correct.

Q. I show you a paper, a copy of a contract, dated April 21st, 1910, between the Biograph Company and the General Film Company. Will you please look at that. A. (Witness examines paper.)

Mr. GROSVENOR: Mr. Examiner, will you mark that as an exhibit?

The Examiner marks the paper examined by the witness as Petitioner's Exhibit No. 242.

By Mr. GROSVENOR:

8 Q. Mr. Dyer, were a series of contracts of the same tenor as this instrument which I have shown you, executed on that date named, April 21st, 1910, between the General Film Company and each of the so-called Patents Company licensees? A. I think that is so, but I cannot state whether they were all executed on that day or not.

Q. In any event, they were executed about that time? A. I think that is so, yes.

Q. It is a fact, is it not, that all the common stock of the General Film Company was portioned out among the Patents Company licensees? A. It is not.

4 Q. How much of that common stock was owned or taken by others than the Patents Company licensees when the General Film Company was organized? A. In the case of the Essanay Company, the stock stands in the name of George K. Spoor, and in the case of the Selig Company, it stands in the name of W. N. Selig.

Q. And George K. Spoor is the principal owner and officer of the Essanay Company, one of the Patents Company licensees? A. I understand so.

Q. And Selig is the principal owner and officer and man-

1 ager of the Selig Company, another of the Patents Company licensees? A. I understand that is so, but I made my statement to emphasize the fact that the agreements which you speak of were made with the Selig and Essanay Companies and not with those stockholders.

Q. Well, all of the common stock of the General Film Company when it was organized, was all issued to the Patents Company licensees except the amounts which were issued to the two individuals you have named, Spoor and Selig, who received the allotment of their companies instead of the allotment going directly to those companies?

2 A. I think that is so.

Q. You may state whether or not the common stock in the General Film Company held by the Edison Company was deposited pursuant to this agreement with the Empire Trust Company, subject to the condition that it should be released or bought back in case the Edison Company went out of business? A. I do not think it was. I do not think any of the stock was deposited with the Empire Trust Company.

3 Q. Are you able to state whether or not these agreements were carried into effect? A. They were not, no, sir.

4 Q. They were not carried into effect? A. They were not carried into effect, no, sir.

Q. Was the common stock of the General Film Company deposited with any depository? A. I do not think it was.

Q. Are you able to testify whether or not— A. (interrupting): No, sir, I am not able to testify. The Empire Trust Company would be the company, but I do not think any stock was.

Mr. GROSVENOR: I offer this agreement in evidence.

4 By Mr. GROSVENOR:

Q. Who would be able to testify on the part of the Edison Company directly as to whether or not any stock held by the Edison Company in the General Film Company was at any time deposited with a depository? A. The Treasurer of the company could testify positively to that fact.

Mr. CALDWELL: The offer of that paper is objected to, on the ground that the evidence shows it was never carried into effect.

Mr. KINGSLEY: The same objection.

The paper, marked Petitioner's Exhibit No. 242, is received in evidence and is as follows:

Petitioner's Exhibit No. 242. E. H.

TO ALL WHOM IT MAY CONCERN: Be It Known that the Biograph Company (hereinafter called the Vendor), a corporation organized and existing under the Laws of the State of New Jersey, and having a place of business in the City, County and State of New York, for and in consideration of the sum of One Dollar (\$1), to it in hand paid by the GENERAL FILM COMPANY (hereinafter called the Vendee), a corporation organized and existing under the Laws of the State of Maine, and having an office in the City, County and State of New York, and for other good and valuable considerations from the Vendee to the Vendor moving, the receipt of all of which is hereby acknowledged, hereby covenants and agrees:

I. That in case, prior to August 26, 1919, the Vendor should become bankrupt or a certain license in writing now held by the Vendor from the Motion Picture Patents Company, of New York City (to manufacture motion pictures for the use of cameras under released letters patent No. 12,057, dated September 29, 1902, letters patent No. 629,068, dated July 18, 1899, and letters patent No. 707,934, dated August 26, 1902, and containing the inventions of released letters patent No. 12,102, dated January 12, 1904) should be terminated, then and in either of such cases the Vendee shall, on paying therefor one hundred dollars per share to the Empire Trust Company of 42 Broadway, New York City, as Trustee for the use and benefit of the Vendor promptly after knowledge by the Vendor of the happening of such event or events, become the owner of the entire right, title and interest in and to the one hundred shares of the common stock of the Vendee now owned by the Vendor, and any and all additional shares of common stock of the Vendee hereafter, and prior to August 26, 1919, owned or controlled by the Vendor; and in order to facilitate the transfer in such case of such shares to the Vendee, the Vendor will, at even date herewith, duly execute the assignment and power of attorney endorsed on

1 the certificate for the one hundred shares aforesaid now owned by the Vendor and deposit said certificate, assignment and power of attorney, with the Trustee aforesaid, and will thereafter, and as soon as the ownership or control thereof is acquired by the Vendor, execute or cause to be executed in like manner the assignments and powers of attorney endorsed on the certificates of any and all additional shares of such common stock the Vendor may hereafter own or control, and deposit such certificates, assignments and powers of attorney with the said Trustee; said Trustee being hereby authorized and empowered by the Vendor to deliver to the Vendee all of said certificates so deposited with the Trustee on the happening, prior to August 26, 1919, of either of the events aforesaid and the payment as aforesaid by the Vendee of the sum of One Hundred (100) Dollars for each share of such stock to said Trustee for the use and benefit of the said Vendor.

2 II. That the Vendor will not, prior to August 26, 1919, without the consent in writing of the Vendee, assign, transfer or otherwise dispose of or encumber any of the stock aforesaid now owned or hereafter owned or controlled by the Vendor, or of any right, title or interest therein or thereunder, to any person, firm or corporation other than the Vendee.

3 III. That a duplicate of this opinion, duly executed by the Vendor, shall be deposited with said Trustee.

IN WITNESS WHEREOF the said Vendor has executed these presents (in duplicate) this 21st day of April, 1910.

(Sg.) BIOGRAPH COMPANY,
By (Sg.) J. J. Kennedy, President.

4 In the Presence of
(Sg.) J. J. Kennedy.
(Sg.) William Felner.

By Mr. GROSSEVENOR:

Q. Mr. Dyer, who was the principal attorney in devising this so-called Patents Company and the various Patents Company license agreements, that is, between the Patents Company and the manufacturers, and then between the Patents

Company and the exchanges, and the general arrangement? A. I think Mr. Philipp.

Q. M. B. Philipp? A. M. B. Philipp.

Q. And was he the attorney in the forming of the General Film Company, and the issuing of those licenses? A. That is my recollection, yes, sir.

Q. And was he the attorney in making the agreements between the Patents Company and the Eastman Kodak Company? A. Yes, sir, although he was also the attorney for the Eastman Kodak Company, I think.

Q. And he was also the attorney for Pathe Freres, was he not? A. Yes, sir.

Mr. GROSSEVENOR: That is all.

Redirect examination by Mr. CALDWELL:

Q. Mr. Dyer, why was the litigation conducted against the Biograph Company, subsequent to 1904, on the camera release given precedence over the litigation on the film release? A. As I have stated, it is my present recollection that when the two release patents were granted, No. 12,037, and 12,038, suits were brought simultaneously upon both patents against the Biograph Company, and those suits progressed simultaneously some time. It then developed that the Biograph Company were relying upon the fact that the word "equi-distant" had been omitted from the claims of the first film release, No. 12,038, and intended to argue that because of this omission, these claims were actually broader than the claims of the original patent, not narrower. Therefore, the suit on the first film release patent was dropped, and that patent was reissued again in January, 1904, No. 12,192. At that time, we had gone ahead for some time, probably upwards of two years, or almost two years, with the camera patent, and to start a suit all over again on the film patent would necessitate commencing it from the beginning, so that the suit on the camera release patent was, therefore, the one that was pressed, and we felt that if we should succeed in this suit, it would have the same effect as if we had succeeded in both suits.

Q. Were not the defenses in the two suits on the camera and the film, respectively, substantially the same?

1 Mr. GROSVENOR: I object to that as improper. On the further point, that it states something which has not been testified to—in other words, there was not any suit on the film patent reissue No. 12, 192 for four years, and, therefore, there was no defense to characterize.

Mr. CALDWELL: He has stated, however, that there was a suit on that first film reissue.

2 Mr. GROSVENOR: If you refer, then, to No. 12, 038, which was abandoned in 1904, of course, that makes the question more distinct. What is the question?

The Examiner repeats the question as follows:

“Q. Were not the defenses in the two suits on the camera and the film, respectively, substantially the same?”

3 The Witness: Well, of course, I don't remember the details of the answers, but my recollection is that they were the usual defenses in patent suits, and I believe also that there were some specific defenses that would not be common to both suits, that is to say, the defense in the film patent suit, probably asserted the broadening of the claim, and the defense in the camera patent suit probably set up a large number of alleged anticipating machines, which I would not suppose would be included in the defense on the film patent, but they were, as I recall, the usual stereotyped patent defenses.

By Mr. CALDWELL:

4 Q. Was not a large part of the prior art set up by these defenses in the two suits, substantially the same? A. I think that is so.

Q. Did you believe, at that time, that the sustaining of the camera patent would give you substantially the same monopoly of the art that would have resulted from the sustaining of both patents?

Mr. GROSVENOR: Objected to as to what his belief would have been, as immaterial.

Mr. CALDWELL: I believe it is material, on the charge that the patent owner was negligent or slothful in the prosecution of his patent rights.

The Witness: Yes, we considered the monopoly practically co-extensive in both cases.

By Mr. KINGSLEY:

Q. Did Mr. Philipp represent the Edison Company—

Mr. GROSVENOR (interrupting): Is this part of a cross examination, or is this part of a redirect?

Mr. KINGSLEY: This is part of the cross examination.

Mr. GROSVENOR: By another defendant?

Mr. KINGSLEY: By another defendant.

By Mr. KINGSLEY:

Q. Did Mr. Philipp represent the Edison Company at the time the Edison license agreement was formed and promulgated? A. No, sir, he represented the Pathe concern at that time.

Mr. GROSVENOR: I wish you would state, at the beginning, Mr. Examiner, that this is cross examination by Mr. Kingsley, and on whose part it is.

Mr. KINGSLEY: I am asking this witness questions on behalf of the clients whom I represent, and it is on record which clients I represent.

Mr. GROSVENOR: And you are not making him your witness?

Mr. KINGSLEY: I am not making him my witness, but I do not care whether he is or not in respect to these particular questions.

By Mr. KINGSLEY:

4 Q. Did Mr. Philipp represent the Edison Company in connection with the negotiations which culminated in the formation of the Patents Company? A. No, sir, I think he directly represented the Pathe concern.

Q. Did you represent the Edison Company, either alone or in conjunction with someone else in connection with the negotiations, regarding which I have just asked you? A. I represented the Edison Company in all the negotiations. I was the representative of the Edison Company.

Q. Do you know whether or not Mr. Philipp prepared the rental exchange license? A. I do not recall that.

- 1 Q. Or the Patents Company? A. I do not recall that.
Q. Do you know whether or not Mr. Phillip prepared the projecting machine license of the Motion Picture Patents Company? By that I mean the license to manufacture projecting machines. A. I don't recall that.

Mr. KINGSLEY: That is all.
Mr. GROSVENOR: Are you through with him, Mr. Caldwell?
Mr. CALDWELL: I am through.

- 2 Recross examination by Mr. GROSVENOR:

Mr. Dyer, the greater part of the commerce, as I understand your testimony on direct examination, relating to motion pictures, is the commerce in positive film; isn't that the fact?

Mr. CALDWELL: That question is objected to on the ground that it assumes that there is a commerce in the motion picture art.

- 3 Mr. KINGSLEY: I also object to the question on the ground that it is attempting to compel the witness to characterize transactions in the motion picture art as commerce.

Mr. GROSVENOR: I do not want to put you in an unfortunate predicament, Mr. Dyer. You testified yesterday that at any one moment there are some 20,000 films in use or in transit—which—in the country?

The Witness: In transit.

- 4 By Mr. GROSVENOR:

Q. That is, at this very moment at which you are talking, it is your best judgment that there are 20,000 different films in transit going from the manufacturers to the exchanges, or from the exchanges to the exhibitors, or on their homeward journey from the exhibitors to the rental exchanges?

Mr. KINGSLEY: I object to that question, on the ground that the witness specifically stated yesterday

when testifying regarding this phase of the case, 1
20,000 plays were in transit.

Mr. GROSVENOR: Will you read the question now, and let him answer? He nodded, but he did not answer.

The Examiner repeats the question as follows:

"Q. That is, at this very moment at which you are talking, it is your best judgment that there are 20,000 different films in transit going from the manufacturers to the exchanges, or from the exchanges to the exhibitors, or on their homeward journey from the exhibitors to the rental exchanges?" 2

The Witness: I think it within the bounds of possibility to say that at all times there are 20,000 of these motion picture plays in their passage from the producer to the exchanges, from the exchanges to the exhibitors, from the exhibitors back to the exchanges, and from the exchanges back again to the producers.

By Mr. GROSVENOR:

3 Q. Then much the larger portion of the business relating to the motion picture art is or consists of the business in these motion picture films? A. Yes, sir; that is, the larger part of the business by long odds, is the purely artistic, theatrical side. The sale of machines, and accessories of that kind, is a very small percentage.

Q. And that is an accurate description of the conditions existing in the last five or six years? A. Well, I think five or six years ago there were more machines bought, because theatres were starting, and they were getting their supplies of machines in, and I do not think at the present time so many machines are sold.

Q. But what I mean is, it has always been the case, has it not, that the business in positive films has been much the larger part of the business, or much larger than any other one branch of the business? A. Much larger than the machine business or any other accessory sales.

Q. Yes. In spite of that fact, in that period from 1904 down to 1908, you were trying to enforce only you—and by "you" I mean the Edison Company—your patent on the 4

1 camera, and you were not in those years, as you have testified, trying to enforce or maintain your rights or alleged rights under the film reissue No. 12,192?

Mr. CALDWELL: That is objected to on the ground that it assumes something that the witness has not testified to. He has not testified that they were not endeavoring to enforce their rights under the film patent, but his examination on that point was directed by counsel for the petitioner to the litigation between the Edison Company and the Biograph Company.

Mr. GROSVENOR: I think, Mr. Caldwell, if you will refer to your last questions on the redirect, you will see that my question is a fair one.

Mr. CALDWELL: I thought that you were referring to your questions.

The Witness: Will you please read the question?

Mr. GROSVENOR: I understand that you on your redirect brought out the fact that he was pressing the suit on the camera patent.

Mr. CALDWELL: (Interrupting): Against the Biograph Company.

Mr. GROSVENOR: On the ground that he thought that would establish their entire rights.

Mr. CALDWELL: Against the Biograph Company. Mr. GROSVENOR: Read the question.

The Examiner repeats the question as follows:

"Q. In spite of that fact, in that period from 1904 down to 1908, you were trying to enforce only your—and by 'you' I mean the Edison Company—your patent on the camera, and you were not in those years, as you have testified, trying to enforce or maintain your rights or alleged rights under the film reissue No. 12,192?"

The Witness: As I have stated with regard to the patents, they were substantially co-extensive, and the suit against the Biograph Company was particularly selected—

Mr. GROSVENOR: (Interrupting): What suit? The suit on the film?

The Witness: The suit on the camera patent. The camera reissue. It was selected because if we were successful in that suit, as we eventually were, we would be able to get preliminary injunctions; in other words, it was not necessary to go ahead with the elaborate details of a patent suit against the other infringers.

By Mr. GROSVENOR:

Q. You did not expect to be able to stop the importation of foreign films by winning a suit against the Biograph Company on the camera patent, did you? A. I do not think that foreign films would be stopped by the the successful termination of the suit on a camera patent, but that was the most potent infringement at the time, and we were confining our energies practically entirely to that.

Q. That is, the camera patent? A. The camera patent.

Q. Mr. Dyer, you bought, didn't you, in the height of the war between the Edison and the Biograph companies, some shares of the stock of the Biograph Company? A. Yes.

Q. When was that purchase made? A. I do not recall when that was made, but Mr. Marion of the Kalem Company told me that he had some stock of the Biograph Company, with which he was formerly connected, and in view of the bitterness of the struggle between the two concerns, I thought it might be well to get hold of this stock, so that, if possible, we could attend stockholders' meetings, and we bought the stock. It was some time after the Edison Houses were granted and before my negotiations with Mr. Marvin. Therefore I should say it may have been in May or June of 1908.

Mr. GROSVENOR: That is all.

Examination by Mr. KINGSLAY:

Q. What was the amount of that stock, Mr. Dyer? A. Twenty-five shares.

Q. What is the par value of those 25 shares? A. My recollection is, that par value was \$100 a share, and we bought it for \$10 a share.

Q. What was the capitalization of the Biograph Company at that time? A. I don't remember. Very large.

Mr. KINGSLAY: That is all.

GEORGE F. SCULL
SINCE BUILDING, 40 BROADWAY
NEW YORK CITY
PATENTS AND PATENT CAUSES

Mr. C. H. Wilson,
Thomas A. Edison, Inc.,
Orange, N.J.

My dear Mr. Wilson:--

I enclose herewith in duplicate memorandum on Patents Company affairs which I think covers what you had in mind when I saw you on Wednesday.

The matter was written up yesterday before I had received a copy of the proposed decree from the Government, which I enclose. I have also sent a copy of this proposed decree to Mr. Holden.

In this proposed decree the Government does not ask for the dissolution of the Patents Company, and in fact, outside of declaring various license agreements and agreements between the General Film Company and the licensed manufacturers unlawful, has done very little except to provide that either the licensed manufacturers shall dispose of their common stock, or shall permit the preferred stockholders to vote.

There will probably be some negotiations in reference to this form after the various defendants have seen it, and I shall keep you advised of what is going on.

GFS/LNB
Enclosures.

*Proposed form
attached to letter of
from Scull and
advised from
form of
Scull*

*CHW
11/14*

The decree is not based at all

W

*What some
of our friends
could wish for, only the
one in five days to do
I don't think
the Government
will do it
to fight the case
to fully examine it.*

November 14th, 1915.

*See file
445-10-10
for copy of
memo.*

[ENCLOSURE]

11/18/15

Parade

12417

NOTES ON PRESENT STATUS OF PATENTS
COMPANY AFFAIRS.

Patents

At the present time, the Patents Company owns only projecting machine patents, of which that for the Latham loop is the only one of any great value.

Under these patents, practically all of the machines now in use have been made and sold by the licensed machine manufacturers under the condition that they will be used only with film licensed by the Patents Company and the payment of a weekly royalty to be fixed by the Patents Company. The license to use ends if the Patents Company ceases to own the patents. So do the licensees to machine manufacturers. The assignments of the patents were made with the provision that if the Patents Company is dissolved, the patents revert to their original owners, the Biograph Company and Armat Company. The decree in the Government case will probably require this dissolution. If the Patents Company does not appeal, the Company must then dissolve and the Latham patent will go to the Biograph Company free of any outstanding licensees. The Edison Company will be converted from a half owner to a possible infringer. Marvin has hinted at the possibility of the Patents Company's not appealing. This should not be agreed to, unless the Edison Company's present rights are preserved.

[ENCLOSURE]

There are now two infringement suits pending on the Latham patent, which are expected to be tried before the end of the year. One is against an exhibitor, the Universal Manufacturing Company and the Universal Exchange, the other is against the Greater New York Exchange (Fox) and one of Fox's theatres). In each case, it is sought to hold the exhibitor liable for his weekly royalty and the film manufacturer and film exchange as contributory infringers for furnishing him film by which he is enabled to infringe. The success of these suits is problematical, but it is the only way now to derive revenue from the patent, and if they succeed, the Patents Company will be in a position to enforce its weekly royalties from all machines until August, 1919, when the patent expires. No attempt is being made to enforce the restriction as to the use of licensed film because of possible complications under the Clayton Act.

Royalties.

With the stoppage of payment by the General Film Company, the Patents Company's only source of royalties is from the machine manufacturers at \$5. per machine. This amounts to about \$25,000. per year, payable quarterly.

Licenses

The film manufacturers agreed to pay a flat royalty of \$2,500 per year payable quarterly. Most of them are in arrears and the Patents Company has sent notices of

[ENCLOSURE]

an intention to cancel these licenses unless payment is made.

The General Film Company has not given up its license, but simply notified the Patents Company of its intention to suspend payments pending the appeal in the Government case. Instead of canceling the license, it is the intention of bringing suit under the license contract for the amount the General Film Company is in arrears, now amounting to about \$6,000. Other suits will be brought from time to time as the other arrears accumulate. The only defense the General Film Company can have is the illegality of the contract. To make this defense would require the General Film Company to allege that the contract is in furtherance of an unlawful conspiracy and in view of the advantage which triple damage claimants may make of this allegation, it seems hardly likely such a defense will be made. The Patents Company ought, therefore, to be able to enforce the collection.

Damage Suits

There are three of these suits now pending, one by the Greater New York Film Rental Co. for \$1,800,000., one by the Imperial Film Exchange for \$750,000. and one by the alleged successor to the Lake Shore Film Exchange for \$300,000. This last suit is against the General Film Company only; the others are against all the manufacturers, the General Film Company and the Patents Company. None of these suits will be

[ENCLOSURE]

brought to trial before the decree in the Government case is signed, and if an appeal is taken from that, (which every one has agreed should be done) the trials will probably be held up until the Supreme Court has decided the case. Up to date, the Government has not submitted a form of decree and after it does, there will probably be considerable time before its final form is settled and signed.

Resources

The Patents Company bank balance is about \$15,000.

Its debts are paid to date.

Its present weekly expenses are about \$1,200. per month, exclusive of legal expenses. A revenue of about \$300. per month is derived from charges to the manufacturers for quarters and services in censoring film. If this income is withdrawn, the expense will be decreased, though not by the same amount.

By an arrangement made about 1911, the expense of various litigations, including the Government suit and other matters, were to be paid, one-third by the Patents Company, one-third by the General Film Company and one-third by the licensed manufacturers. This account has never been balanced and under it the General Film Company now owes the Patents Company about \$40,000. and the licensed manufacturers about \$41,000. The settlement of this account has been repeatedly

[ENCLOSURE]

urged but has always been held up because the licensed manufacturers could never agree amongst themselves on what basis each should pay his share of the one-third for which all are responsible.

Since the General Film Company has broken its agreement as to royalties, the Patents Company should withdraw from its agreement to stand one-third the expense of the Government case and possibly of the triple damage suits, at least as to any future expenses.

If the revenue from machine manufacturers continues, The Patents Company should be self-sustaining at least until some of the litigation above referred to is determined.

George F. Hall

GEORGE F. SCULL
SINGER BUILDING, 149 BROADWAY
NEW YORK CITY
PATENTS AND PATENT CAUSES

Mr. C. H. Wilson,
Thomas A. Edison, Inc.,
Orange, N.J.

My dear Mr. Wilson:--

I enclose herewith a copy of a revised draft of a proposed decree in the Government case submitted by the Department of Justice for our consideration. The previous draft submitted was drawn up by Mr. Grosvenor apparently without consulting his side partner, Rogers, who represents the Greater New York. Rogers has now gotten in touch with Grosvenor and has put a couple of clauses in here somewhat veiled, to be sure, which are intended to directly benefit the Greater New York.

I first call your attention to the fact that this second draft proposes that the manufacturers shall dispose of all of their holdings of common and preferred stock of the G.F. and are not permitted to acquire any thereafter. (Eighth) Notice that nothing is said about the holdings of stock of the several individual defendants.

I also call your attention to Paragraph Eleventh which, of course, is intended directly to compel the manufacturers to continue to deal with the Greater New York. You will note that it is not merely limited to two or more manufacturers dealing with the General Film Company, but with any other agency. In other words, if Edison and Kleine continue to distribute through Kleine's agencies, this paragraph would compel the Edison Company to give copies to the Greater New York. I think that comment on this is unnecessary. In my opinion, the Court will have no authority to impose any such restriction. All such conditions are imposed merely as alternatives to breaking up the alleged combination into its original components, and that, in my opinion, is already provided for in compelling the manufacturers to give up their stock in the G.F. as well as any agreements with that company. To further saddle them with a positive prohibition that if they wish to engage in commerce the same as other concerns are now doing, they shall be bound by restrictions not imposed upon

November 30th, 1915.



Mr. C. H. Wilson

-2-

11/30/15.

such others is, in my mind, absolutely incomprehensible. I believe on such a situation being pointed out to the Court, it will not be approved.

In Paragraph Fifth the Court is made to declare the assignments of the patents to the Patents Company illegal. From a lawyer's standpoint, I am frank to say I do not see how this can be. The Court may find that the assignments were made in pursuance of an unlawful agreement, but certainly it cannot say that the assignments themselves are unlawful.

Paragraph Twelfth is aimed directly at the suits which we now have pending on the Latham patent. While these suits are not brought on the license agreements and are straight infringement suits, the defendants will undoubtedly raise a question of a license, and they already have placed themselves in the peculiar position of alleging that they are licensed under agreements which are unlawful. Obviously it would be a nice short cut for the Greater New York to have us stopped from prosecuting these suits, but I think a way out can be found by which the Court will be satisfied to let us continue the prosecution of these suits. The illegality of the assignments to the Patents Company which is set forth in Paragraph Fifth, of course immediately raises the question as to the status of the patents in the Patents Company's hands at any time, and consequently the possibility of granting licenses if the Patents Company had no title. In short, the statements made in the decree in reference to the patents are so absurd and lead to such ridiculous conclusions, that I cannot believe the Court is going to sanction them, and I do not believe that Mr. Grosvenor appreciated the snarl which such a decree would involve. Copies of this decree are being sent to the representatives of the different defendants, and there probably will be a get-together in reference to it after the several lawyers have had time to digest it. You can see from its form that Grosvenor simply submits it as a form, since it is not complete as to Paragraphs Eighth and Thirteenth.

I am sending a copy of the decree and of this letter to Mr. Holden.

Yours very truly,

George F. Seull

GFS/LMS
Enclosure.

[ENCLOSURE]

10/29/15
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

THE UNITED STATES OF AMERICA,
Petitioner,

-against-

MOTION PICTURE PATENTS COMPANY, et al,

Defendants.

BEFORE OLIVER B. DICKINSON, UNITED STATES DISTRICT JUDGE.

D E C R E E.

This cause came on for final hearing upon the pleadings and all the evidence and was argued on behalf of the petitioner by Edwin P. Grosvenor, Special Assistant to the Attorney General, and on behalf of the defendants by Charles F. Kingsley, Melville Church and Hon. Reuben O. Moon, and thereafter, upon consideration thereof, the Court announced and caused to be filed, on October 1, 1915, its written opinion therein,

Whereupon the Court adjudged, ordered and decreed as follows:

FIRST: That the petition be and is hereby dismissed as to the defendant, Melies Manufacturing Company.

[ENCLOSURE]

SECOND: That the defendants (other than the Melies Manufacturing Company, against whom the petition is dismissed) and each of them, in the manner set forth and described in the petition, have attempted to monopolize and have monopolized and have combined and conspired, among themselves and with each other, to monopolize a part of the trade or commerce among the several states and with foreign nations, consisting of the trade in films, cameras, projecting machines, and other accessories of the motion-picture business, as charged in the petition of complaint filed herein, in violation of the Act of Congress, approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies. (See Opinion, page 13).

THIRD: That the defendants (other than the said Melies Manufacturing Company) and each of them, in the manner set forth and described in the petition, have entered into and are engaged in a combination and conspiracy in restraint of trade and commerce among the several States and with foreign nations in films, cameras, projecting machines and other accessories of the motion picture business in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraint and monopolies."

FOURTH: That the contracts, licenses and agreements enumerated in the petition, to wit, the license agreements entered into between the Motion Picture Patents Company and the Patents Company licensees, to wit, the Biograph Company, the Edison Manufacturing Company, Essanay Film Manufacturing

[ENCLOSURE]

Company, Kalem Company, George Kleine, Lubin Manufacturing Company, Pathe Freres, Selig Polyscope Company and Vitagraph Company of America; the license agreements between the Patente Company and the rental exchanges; the licenses from the Patente Company to the exhibitors; the license agreements between the Patente Company and manufacturers of exhibiting machines; the license agreements between the Patente Company and the General Film Company; the agreements between the General Film Company and the said Patente Company licensees, to wit, the Biograph Company, the Edison Manufacturing company, Essanay Film Manufacturing Company, Kalem Company, George Kleine, Lubin Manufacturing Company, Pathe Freres, Selig Polyscope Company and Vitagraph Company of America; and all other license agreements referred to and described in the petition, the answers, or in the evidence superseding the above enumerated license agreements, have been and are the means adopted and used by the defendants in order to carry into effect the objects and purposes of said unlawful combination and conspiracy in restraint of said interstate and foreign trade and commerce in films, cameras, projecting machines and other accessories of the motion picture business in violation of said Act of Congress and that the said contracts, licenses and agreements are, therefore, hereby declared illegal and the defendants and all and each of them and their officers, agents, servants and employees are enjoined and prohibited from doing anything in furtherance of said agreements and from enforcing in any manner said agreements or any of the terms thereof.

FIFTH: That the said contracts, agreements and licenses enumerated in the petition and the combination therein described was a conspiracy in restraint of

[ENCLOSURE]

trade and commerce among the several States and with foreign nations and were and are illegal. (See Opinion, page 13).

SIXTH: That the acquisition by the defendant, General Film Company, of the rental exchanges enumerated in the petition and in the manner therein described was in pursuance of the general purpose and plan of defendants to monopolize said trade and commerce and was unlawful and in violation of said Act of July 2, 1890, and that in order to bring about a condition in harmony with the law, the defendants, Biograph Company, Edison Manufacturing Company, Essanay Film Manufacturing Company, Kalem Company, George Kleine, Lubin Manufacturing Company, Pathe Freres, Selig Polyscope Company and Vitagraph Company of America, before

1916, shall either dispose of their holdings of common stock of the General Film Company or shall amend the by-laws and charter of the General Film Company so as to grant to the preferred stockholders an equal right with the common stockholders of the company to vote at meetings of the stockholders, so that preferred stockholders shall have the right to vote on all matters in respect of which the common stockholders have a right to vote.

SEVENTH: That the said defendants, their officers, agents, servants and employees, are enjoined and prohibited from continuing their said combination, conspiracy and monopoly and attempt to monopolize interstate commerce in said articles by means of the said unlawful contracts or license agreements or by any other means similar thereto.

[ENCLOSURE]

EIGHTH: That the said defendants, their officers, directors, agents, servants and employees, are enjoined and prohibited from resuming, engaging in, continuing or carrying into farther effect the combination and conspiracy the monopoly and attempt to monopolize adjudged illegal hereby and from engaging in or entering into any like combination or conspiracy or monopoly or attempt to monopolize the effect of which will be to restrain commerce in said articles among the several States of the United States or in the territories of the United States or with foreign countries by making any express or implied agreement or arrangement, together or one with another, like that adjudged illegal herein relative to the control or management of the business of the said defendants in films, cameras, projecting machines and other accessories of the motion picture business, the effect of which will be to prevent each and any of them from carrying on interstate and foreign trade and commerce in said articles in competition with the others.

NINTH: That this decree shall not be construed to prevent whoever may be the owner or owners of the several patents enumerated in the petition, the life or lives of which shall not already have expired, from granting lawful licenses to any of the defendants or others to use such patent or patents or to prevent the defendants or others from taking lawful licenses to use any of such patent or patents.

TENTH: That judgment for its lawful costs is hereby given in favor of the petitioner and against the defendants.

[ENCLOSURE]

as to whom the petition has not been dismissed.

ELEVENTH: Nothing in this decree contained shall prevent the defendants or any of them from the institution, prosecution or defense of any suit, action or proceeding to prevent or restrain the infringement of any patent or patents or otherwise assert or defend a claim to any property or rights therein.

[ENCLOSURE]

Form 2
Submitted 11/29/15

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

THE UNITED STATES OF AMERICA,
Petitioner,

-against-

MOTION PICTURE PATENTS COMPANY, et al.,
Defendants.

BEFORE OLIVER B. DICKINSON, UNITED STATES DISTRICT JUDGE.

D E C R E E.

This cause came on for final hearing upon the pleadings and all the evidence and was argued on behalf of the petitioner by Edwin P. Grosvenor, Special Assistant to the Attorney General, and on behalf of the defendants by Charles F. Kingsley, Melville Church and Hon. Reuben O. Mbon, and thereafter, upon consideration thereof, the Court announced and caused to be filed, on October 1, 1915, its written opinion therein,

Whereupon the Court adjudged, ordered and decreed as follows:

FIRST: That the petition be and is hereby dismissed as to the defendant, Melisse Manufacturing Company.

SECOND: The death of Samuel Long occurred after the final hearing and there has been no revivor.

THIRD: That the defendant's (other than the Melisse Manufacturing Company, against whom the petition is dismissed) and each of them, in the manner set forth and described in the petition, have attempted to monopolize and have monopolized and have combined and conspired, among themselves and with

[ENCLOSURE]

each other, to monopolize a part of the trade or commerce among the several States and with foreign nations, consisting of the trade in films, cameras and projecting machines and parts thereof, as charged in the petition of complaint filed herein, in violation of the Act of Congress, approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies."

FOURTH: That the defendants (other than the said Melies Manufacturing Company) and each of them, in the manner set forth and described in the petition, have entered into and are engaged in a combination and conspiracy in restraint of trade and commerce among the several states and with foreign nations in films, cameras and projecting machines and parts thereof in violation of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraint and monopolies."

FIFTH: That the several agreements enumerated in the petition for the assignment of patents to the Motion Picture Patents Company; the several assignments of said patents to said company pursuant to such agreements; the contracts, licenses and agreements enumerated in the petition, to wit, the license agreements entered into between the Motion Picture Patents Company and the Patents Company licensees, to wit, the Biograph Company, the Edison Manufacturing Company, Essanay Film Manufacturing Company, Kalem Company, George Kleine, Lubin Manufacturing Company, Pathe Freres, Selig Polyscope Company, Vitagraph Company of America and Gaston and George Melies; the license agreements between the Patents Company and the rental exchanges; the licenses from the Patents Company to the

[ENCLOSURE]

exhibitors; the license agreements between the Patents Company and manufacturers of exhibiting machines; the license agreements between the Patents Company and the General Film Company; the agreements between the General Film Company and the said Patents Company licensees, to wit, the Biograph Company, the Edison Manufacturing Company, Essanay Film Manufacturing Company, Kalem Company, George Kleine, Lubin Manufacturing Company, Pathe Freres, Selig Polyscope Company and Vitagraph Company of America, and Gaston and George Melies; and all other license agreements referred to and described in the petition, the answers, or in the evidence superseding or succeeding the above enumerated license agreements and contracts, and all licenses under said patents so assigned to the Patents Company, subject to the assignment to that company, have been, were and are the means adopted and used by the defendants in order to carry into effect the objects and purposes of said unlawful combination and conspiracy in restraint of said interstate and foreign trade and commerce in films, cameras and projecting machines and parts thereof in violation of said Act of Congress and that the said contracts, licenses and agreements and assignments of patents are, therefore, hereby declared illegal and the defendants and all and each of them and their officers, agents, servants and employees are enjoined and prohibited from doing anything in furtherance of said agreements and from enforcing in any manner said agreements or any of the terms thereof.

SIXTH: That the said assignments, contracts, agreements and licenses enumerated in the petition and the combination therein described was a conspiracy in restraint of trade and commerce among the several states and with foreign nations and were and are illegal.

SEVENTH: That the acquisition by the defendants of the

[ENCLOSURE]

rental exchanges enumerated in the petition and in the manner therein described and their attempt to acquire or put out of business other rental exchanges were in pursuance of the general purpose and plan of defendants to monopolize said trade and commerce and were unlawful and in violation of said Act of July 2, 1890.

EIGHTH: That in order to bring about a condition in harmony with the law, the defendants, Biograph Company, Edison Manufacturing Company, Essanay Film Manufacturing Company, Kalem Company, George Kleine, Lubin Manufacturing Company, Pathe Freres, Selig Polyscope Company, Vitagraph Company of America, and Gaston Melies before 1916, shall dispose of their holdings of common and preferred stock of the General Film Company and shall file in court affidavits or other proof satisfactory to the court as evidence that they have complied with the decree of the court in this regard and said defendants shall be enjoined from hereafter acquiring or holding any stock of the General Film Company. (Note: This clause should be amplified to conform to decree in Reading case recently entered by McPherson and other Circuit Judges.

NINTH: That the said defendants, their officers, agents, servants and employees, are enjoined and prohibited from continuing their said combination, conspiracy and monopoly and attempt to monopolize interstate commerce in said articles by means of the said unlawful contracts or license agreements or by any other means similar thereto.

TENTH: That the said defendants, their officers, directors, agents, servants and employees, are enjoined and prohibited from resuming, engaging in, continuing or carrying into farther effect the combination and conspiracy, the monopoly and attempt to monopolize adjudged illegal hereby

[ENCLOSURE]

and from engaging in or entering into any like combination or conspiracy or monopoly or attempt to monopolize the effect of which will be to restrain commerce in said articles among the several States of the United States or in the territories of the United States or with foreign countries by making any express or implied agreement or arrangement, together or one with another, like that adjudged illegal herein relative to the control or management of the business of the said defendants in films, cameras, projecting machines and other accessories of the motion picture business, the effect of which will be to prevent each and any of them from carrying on interstate and foreign trade and commerce in said articles in competition with the others.

ELEVENTH: As long as two or more of the Patents Company licensees, defendant manufacturers, shall use the General Film Company as the common distributing agency for their films or shall use some other common distributing agency, they shall distribute their product on equal terms to any rental exchange which may now be handling their film. That is to say, the purpose of this provision is to insure the continuance of the present conditions and to prevent the defendants employing an exclusive distributing agency; the purpose is also to furnish the exhibitor more than one source of supply of these films so that there will be competition for the business of the exhibitor in respect to this class of film.

TWELFTH: Defendant Motion Picture Patents Company, and other defendants other than the Melies Manufacturing Company are enjoined and restrained from prosecuting or continuing the prosecution of any suit based upon the alleged infringement of any of the patents enumerated in the petition where the act which defendants aver constituted the ground of

[ENCLOSURE]

infringement was merely the breach of one of the conditions enumerated in said licenses for license agreements hereinabove adjudged unlawful. That is to say, the purpose of this paragraph of this decree is to prevent the prosecution of suits where the alleged cause of action is founded upon a violation of an unlawful contract or license agreement.

THIRTEENTH: Insert here a provision against the use of a tying clause which the Latham patent..... Confer Shoe Machinery decree which should be used as a model.

FOURTEENTH: That judgment for its lawful costs is hereby given in favor of the petitioner and against the defendants as to whom the petition has not been dismissed.

**Legal Department Records
Motion Pictures - Case Files**

James H. White and John R. Schermerhorn v. Percival L. Waters

This folder contains material pertaining to the suit brought by two Edison Manufacturing Co. employees, James H. White and John R. Schermerhorn, against Percival Waters of the Kinetograph Co. The case was initiated in the New York Supreme Court for the County of New York in January 1909 and involved kickbacks and conflicts of interest. The selected items include the judicial finding from June 1910 against the plaintiffs, along with affidavits subsequently collected by the plaintiffs in order to reopen the case and clear their names. The affidavits are by Alexander T. Moore, the two plaintiffs, and their attorney, Selden Bacon. Among the items not selected are briefs for the defendant, testimony from the second trial, additional affidavits, and documents that duplicate information in the selected material. The affidavits by Edison and William E. Gilmore from the first trial have not been located.

SIR:

TAKE NOTICE THAT THE WITHIN IS A COPY OF A

S U P R E M E C O U R T ,
C O U R T O F N E W Y O R K ,

THIS DAY DULY ENTERED IN THIS ACTION, AND FILED IN THE
OFFICE OF THE CLERK OF THE

COURT IN AND FOR

DATED, NEW YORK, 191

YOURS, ETC.,
MACDONALD & BOSTWICK,
ATTORNEYS FOR
15 WILLIAM STREET,
NEW YORK CITY.

TO

ATTORNEY FOR

SIR:

TAKE NOTICE THAT

OF WHICH THE WITHIN IS
A COPY, WILL BE PRESENTED TO MR. JUSTICE

AT

OF THIS COURT,

AT THE IN THE

COUNTY OF ON THE

DAY OF 191 . AT . A. M.
FOR SETTLEMENT AND ENTRY HEREIN.

DATED, NEW YORK, 191

YOURS, ETC.,
MACDONALD & BOSTWICK,
ATTORNEYS FOR
15 WILLIAM STREET,
NEW YORK CITY.

TO

ATTORNEY - FOR

JAMES H. WHITE and JOHN R. SCHER-
MERHORN,

Plaintiffs,

-against-

PERCIVAL L. WATERS,

Defendant.

DECISION & JUDGMENT/

MACDONALD & BOSTWICK

ATTORNEYS FOR defendant.

15 WILLIAM STREET, NEW YORK CITY

DUE AND TIMELY SERVICE OF A COPY OF THE WITHIN IS HEREBY
ADMITTED, THIS DAY OF 191

ATTORNEY FOR

STATE OF NEW YORK, }
COUNTY AND CITY OF NEW YORK. } ss:

above named being duly sworn,
says that he is
in the above entitled action, and has read and knows the contents of the foregoing
that the same is true to his own knowledge
except as to the matters therein stated to be alleged on information and belief and as
to those matters he believes it to be true.

Sworn to before me this
day of 191

}

S U P R E M E C O U R T ,
C O U N T Y O F N E W Y O R K .

*See
1940*

JAMES H. WHITE and JOHN R. SCHREMER-
HORN,

Plaintiffs,

-against-

PERCIVAL L. WATERS,

Defendant.

On the 4th day of May, 1910 the above named plain-
tiffs appeared by their attorney, James M. Walsh by Seldon
Bacon of counsel and the defendant by his attorney Louis
B. Hasbrouck and by Auston G. Fox and Dwight Macdonald of
counsel at a Special Term, Part IV. of this Court.

The action was tried upon the complaint and amend-
ed answer of the above named parties on the said 4th day
of May, 1910 and the 5th and 6th days of May, 1910. The
plaintiffs produced their witnesses, documentary evidence
and oral testimony, and the defendant produced his witnesses,
documentary evidence and oral testimony.

After having heard oral argument, and having read
the briefs submitted by counsel, and after having duly con-
sidered the pleadings, documentary evidence and oral testi-
mony, I direct judgment in favor of the defendant and make
the following findings of fact and conclusions of law.

FINDINGS OF FACT.

1. That prior to and in or about November, 1899
the plaintiff White was in the employ of the Edison Manufac-
turing Company as the manager of the Film and Kinetoscope
Department, and as such had charge of the selection of the

Holio 1

subjects for pictures to be made for that Company.

2. That prior to and in or about November, 1899 the plaintiff Schermerhorn was in the employ of the Edison Manufacturing Company as Assistant General Manager, and as such, had charge of the discounts and credits to be allowed the customers of the Company and as to which his decision was final.

3. That on said date and for a long time prior thereto and during the entire course of their alleged relations with the defendant Waters, as hereinafter set forth, the plaintiffs owed to their employer, the Edison Manufacturing Company, their exclusive services and allegiance.

4. That prior to and during November, 1899, the defendant Waters was engaged in the business of dealing in kinetoscopes and exhibiting kinetoscope pictures.

5. That in or about November, 1899, while employed by the Edison Manufacturing Company, the plaintiffs entered into an arrangement with the defendant as a result of which the plaintiff, White, as the manager of the Film and Kinetoscope Department of the Edison Manufacturing Company, agreed to select such subjects for the Edison pictures as would tend to increase the business of the defendant Waters, and suit the special customers of the defendant Waters, and the plaintiff, Schermerhorn, as Assistant General Manager of the Edison Manufacturing Company agreed to give preferential discounts and credits to the defendant, Waters.

6. That the defendant Waters was to do business under the name of the Winetograph Company.

7. That under and pursuant to such arrangement the defendant on or about the 8th day of May, 1900 paid to the plaintiff, Schermerhorn, the sum of \$177.71 and that prior to and including the 30th day of January, 1903, paid

" 5

" 6

to the plaintiff, White, the sum of \$1817.21, and that between the 8th day of May, 1900 and the 13th day of March, 1903, paid to the plaintiff Schermerhorn the sum of \$1817.21.

8. That such payments were made by the defendant to the plaintiffs while the plaintiffs were in the employ of the Edison Manufacturing Company, pretending and professing to discharge their duties as employees of the Edison Manufacturing Company as set forth in paragraphs 1, 2 and 3, in consideration of the promises of the plaintiffs to conduct a part of their employer's business in the interest of the defendant.

9. That the plaintiffs at no time over had any part in the active management of the business known as the Kinetograph Company, or of the business conducted by said defendant, nor exercised any control or authority over the conduct of said business.

10. That the defendant exclusively and solely managed and conducted said business.

11. That the arrangement as set forth between the plaintiffs and the defendant was an agreement on the part of the defendant to pay the plaintiffs a share of his profits arising out of the business carried on under the name of the Kinetograph Company, or the business so conducted by him as aforesaid, in consideration of the plaintiffs conducting a part of their employer's business in the interest of the defendant.

12. That the plaintiffs entered into their relations with the defendant without the knowledge or consent of their employer the Edison Manufacturing Company.

13. That the plaintiffs did not have the consent of Thomas A. Edison, the President or of William C. Gilmore the Vice-President and General Manager of the Edison Manufacturing Company, to enter into any business relations with

Folio 10

the defendant.

14. That neither said Thomas A. Edison nor said William E. Gilmore had knowledge of the arrangement between the plaintiffs and the defendant and the fact of said arrangement so entered into was concealed by the plaintiffs from the Edison Manufacturing Company, Thomas A. Edison, its President and William E. Gilmore, its Vice-President and General Manager, and from the public.

" 11

15. That the plaintiffs' evidence as to their connection with the Edison Manufacturing Company at the time of making their arrangement with the defendant brought up the issue of the illegality of their contract and arose in the plaintiffs' evidence given in support of the allegations of the complaint.

16. That the amounts of the dealers' discounts which were so directed to be allowed were long before fixed and established and were not determined by the plaintiffs or either of them.

" 12

17. That neither of the plaintiffs had any part in fixing the prices at which the goods of the Edison Manufacturing Company were to be sold.

18. That the plaintiffs were aware of the necessity for filing in the office of the County Clerk of New York County as required by law, the true names and addresses of the owners of the business conducted in the City of New York since on or about December, 1899 under the trade name Kinetograph Company

19. That the plaintiffs took no steps to have any certificate prepared and filed in the office of the County Clerk for New York County giving the true names and addresses of the owners of the business conducted in the City of New York since on or about December, 1899, under the trade name Kinetograph Company and that no such certificate

Folio 13 stating the said plaintiffs were owners or part owners of
the Kinetograph Company was ever so filed.

CONCLUSIONS OF LAW.

1. That the arrangement as above set forth was
in violation of the duty and incompatible with the fidelity
which the plaintiffs owed to their employer the Edison
Manufacturing Company, was void as against public policy
and will not be enforced by a court of equity.

" 14 2. That it was not necessary for the defendant
to plead in his answer the illegality of the arrangement
which was entered into between the plaintiffs and the defen-
dant, for the evidence which showed the illegality of
the arrangement appeared from the testimony of the plain-
tiffs.

3. That the agreement between the plaintiffs
and the defendant was that the plaintiffs should have a
share of the profits of the business conducted by the defen-
dant in consideration of their conducting a part of their
employers' business in the interest of the defendant.

4. That judgment be directed to dismiss the com-
plaint upon the merits.

Dated, New York, June 16th, 1910.

VERNON M. DAVIS,

J. S. C.

Folio 1

At a Special Term, Part IV,
of the Supreme Court of the
State of New York held in and
for the County of New York at
the County Court House in said
County on the 16th day of June,
1910.

P R E S E N T :

HON. VERNON M. DAVIS,

JUSTICE.

JAMES H. WHITE and JOHN R. SCHERMER-
HORN,

Plaintiffs,

-against-

EMERICAL L. WATERS,

Defendant.

The issues in this action having been regularly
brought on for trial before Mr. Justice Vernon M. Davis at a
Special Term, Part IV. of this Court held on the 4th, 5th and
6th days of May, 1910 at the County Court House in the City
of New York, Borough of Manhattan, and the Court having heard
the allegations and proof of the parties and the argument of
counsel and after due deliberation, having duly made and filed
a decision in favor of the defendant and against the plaintiff,
containing a statement of the findings of fact and conclusions
of law thereon directed judgment as hereinafter stated.

NOW ON MOTION OF LOUIS B. HASBROUCK, Esq., attor-
ney for defendant, it is

ORDERED AND ADJUDGED that the complaint of the
plaintiffs be and the same is hereby dismissed upon the
merits without costs to either party as against the other.

E N T E R

WM. F. SCHNEIDER,
Clerk.

V. M. D.,
J. S. C.

Pol. 1.

SUPREME COURT,
NEW YORK COUNTY.

JAMES H. WHITE and JOHN R. SCHEIDTHERHORN,
Plaintiffs,

-against-

PERCIVAL L. WATERS,
Defendant.

STATE OF NEW YORK,)
COUNTY OF NEW YORK,)ss:

2

ALEXANDER T. MOORE, being first duly sworn, deposes and says:

That he is fifty-two years of age and that he resides at No. 135 West 64th Street, New York City.

That about the 1st of March, 1904, deponent was employed as Manager of the Kinetograph Department of the Edison Manufacturing Company, of Orange, New Jersey, and held such position from that time until March 1st, 1909.

Deponent was employed in that position originally by William E. Gilmore, who was a witness in the above entitled cause, and who, at the time of deponent's employment, was Vice-President and General Manager of the Edison Manufacturing Company.

3

Deponent applied for the position of Manager of the Kinetograph Department to said Gilmore several weeks prior to March 1st, 1904, to deponent's best recollection some time in January, 1904. Before deponent was employed by said Gilmore, the said Gilmore sent deponent over to see the defendant Percival L. Waters, saying that Waters knew all about the Kinetograph business. At that time I knew

4 nothing of the moving picture business, but I went and saw
Waters and discussed with him my general business experience.
After that I went back to see Mr. Gilmore about securing the
position and was put off by him with the statement that he
had not yet had an opportunity to see Mr. Waters about me.
I think he put me off in this way twice. At a subsequent
interview, following these statements, he employed me for
the Edison Manufacturing Company.

Previous to this application in January, 1904, I
had known Mr. Gilmore personally for eighteen or nineteen
years and had been employed by various Edison Electric Light
5 Companies by which Gilmore also had been employed.

After I was employed in the position of Manager
of the Kinetograph Department, Mr. Waters frequently came
to me demanding various concessions and favors in the opera-
tion of that department, such as, that I should drop other
work which was paying the Edison Company full rates to
take special pictures for him at the lower rates which were
accorded to him. After a time his requests became quite
burdensome to the business and I declined to accede to some
and early in the year 1906, as I remember the date, he came
to me one day and insisted that I should send a particular
6 photographer named Porter, who was the best photographer
we had, to New Hampshire at once to take a special photograph
for him of an automobile hill clinging contest, which he
wanted to furnish to the Keith and Proctor Theatres. I told
him I could not well send Mr. Porter at that time as he was
busy in the middle of regular other work. Waters became very
insistent and finally said to me that he could get anything

7 he wanted in the way of personal favors connected with the Kinetograph Department of the Edison Manufacturing Company by going over my head to Gilmore and that I knew it. He said he could go right over my head. I told him to go as quick as he pleased and left him and went immediately to see Mr. Gilmore and told him that Waters had said that and Gilmore said "Did Waters say that?" I said "Yes", and that either Waters could run the business or I could, and that I did not propose to have him "running my Department for me." Mr. Gilmore said that he was very much annoyed that Mr. Waters and I had come to a clash and said a number of things to smooth me down, and finally said: "Any favors you do for Waters in this business are the same thing as though you did them for me." The conversation closed there. I did not send Mr. Porter but sent another photographer, to take the hill climbing contest, who could be better spared from the general business.

8

Deponent further says that deponent's management of the Kinetograph Department was not interfered with by Mr. Gilmore except in particulars relating to the business transactions of the Department with the Kinetograph Company, that the only acts of Mr. Gilmore affecting specifically the conduct of the business of the Kinetograph Department were done in either one of two ways; either Mr. Gilmore would do the act himself, sometimes advising deponent promptly thereof and sometimes not, or said Gilmore, without consulting this deponent as to the advisability of the steps, would direct deponent to grant specific concessions to Mr. Waters, Among the instances of this character, which deponent specifically remembers, are the following:

9

The Edison Company had rented the top full floor

10

of the building at 41 East 21st Street, New York City, and also a studio located on the roof of that building, which was about nine-tenths the size of the full floor just below, which it rented. For this complete floor and the studio on the roof, the Edison Company paid One hundred and fifty (\$150.) Dollars a month rent. At first, Mr. Waters occupied practically the full front half of this top floor; after a while, he wanted more space. This was about 1906, and Mr. Gilmore, in my presence, rented the full floor to Waters for Forty (\$40.) Dollars a month, with the exception of a small dark room, which was little more than a closet, about seven or eight feet square, which was used as a test room. Deponent protested to Mr. Gilmore against letting this property at that price to Mr. Waters and tried to secure a larger rental from him, because the other floors in the building were rented at prices as high as Twelve Hundred (\$1200) Dollars a year, or higher; the other floors being of the same value with this top floor.

11

Deponent was over-ruled in this by Mr. Gilmore, who, in deponent's presence, arranged with Mr. Waters that he should have this entire floor, with the exception of the dark room, for Forty (\$40.) Dollars a month. The dimensions of this top floor were about twenty feet by ninety feet.

12

At the time these premises were so rented to Waters by Mr. Gilmore, part of this top floor, so rented to Waters, was greatly needed by the Kinetograph Department in the operation of the Studio on the roof. The actors, for the taking of the films, were, by the renting of all this room to Mr. Waters, deprived of any place to dress except the toilet room, or the dark closet already mentioned, and this was a serious handicap in the operation of the studio.

13 I raised that objection to Mr. Gilmore before he made the arrangement with Waters but he over-ruled it.

In the business of exhibiting moving pictures, for what is called the first run, which is the privilege of exhibiting the pictures when they are first put on the market for a period which ordinarily lasted about a week, a special rental was paid by the exhibitor.

The Kinetograph Company was engaged in the business of renting films and was in the business of exhibiting them themselves. For the first run, during a period of a week or so, exhibitors would pay a rental of approximately twice to three times the ordinary rental for later periods. This was true, not only of the product of the Edison Company, but of the similar products of other film companies, and was a familiar feature of the film exhibiting business.

14 From the time I took the office of Manager of the Film Department, Mr. Water's occupancy of the top floor of 41 East 21st Street gave him the opportunity of observing what pictures we were getting out, before the positive films were actually developed. Our facilities for developing positives were, at that time, limited so that we could not get out many positives at a time.

15 Very frequently, during the first two years, Mr. Gilmore would call me up on the telephone and say "How many positives have you ready" of such and such a film, which had just been completed? I would answer such and such a number, say five or six, and they are going to our Chicago agent, for instance. Mr. Gilmore would say "Give those to Waters", and, of course, I had to obey that direction and Mr. Waters would get those films. This would be repeated with

16 regard to such film if it apparently was particularly desirable, two or three times before I was able to ship any films to the Chicago agent, or to any other agent of the Company, so that on these films Mr. Waters would have the first run, without paying any special price therefor, for a period of from one to three weeks, owing to the restricted capacity of preparing positives.

17 After a time, and, according to my best recollection, about the early part of the year 1906, Mr. Gilmore gave me specific orders to give Mr. Waters two weeks leeway on all general pictures taken, withholding them from any other customers for two weeks. Of course, I had to obey these instructions; but, after a while, on my own responsibility, I cut down the period from two weeks to about ten days. This was done toward the close of Mr. Gilmore's administration, which ended in 1908.

18 During the latter part of 1906, or the early part of 1907, I secured a contract for the Edison Manufacturing Company with the Pittsburg Calcium Light Company, of Pittsburg, Pennsylvania, for ten prints of each Edison general film at eleven cents a foot, and this contract went into full operation.

After a short time, by direction of Mr. Gilmore, these films for the Pittsburg Calcium Light Company were delivered to Mr. Waters at nine cents a foot, and he sold them to the Pittsburg Calcium Light Company at ten cents a foot, resulting in a net loss to the Edison Manufacturing Company of two cents a foot and a gain to the Kinetograph Company of one cent a foot. These films, by Mr. Gilmore's instructions, were delivered directly to Mr. Waters, or possibly, on rare occasions, shipped direct and charged to Mr. Waters.

19

During the meeting of the Film Service Association at Pittsburg, in the year 1907, as I was informed by Eugene Cline, who was present at that meeting, the manager of the Pittsburg Calcium Light Company showed to him, and to several of the film people attending that convention, the offices of the Pittsburg Calcium Light Company and incidentally ten copies of a film entitled "A race for a Million". None of the visitors, Mr. Cline told me, had ever seen the film, or knew that the picture was out, and I believe the information so given me by Mr. Cline. This Mr. Cline was in the film renting business in Chicago.

20

Shortly afterwards, he wrote me a letter calling attention to this occurrence, saying that the film was not yet out, and we had furnished it in this way to the Pittsburg Company ahead of our other customers, of whom he was one, and that, if he was to be accorded that kind of treatment, he would cease business relations with the Edison Manufacturing Company.

21

Depoent called this to Mr. Gilmore's attention and also several similar instances at different times and the result was merely a reiteration of the orders previously given.

The orders given by Mr. Gilmore about giving Waters two weeks leeway on all pictures, not only resulted in my furnishing him the pictures two weeks ahead but forbade my advertising the film, or publishing the fact that we had such a film until the expiration of that two weeks, and extended so far as to forbid me furnishing our Chicago agents, or agents in the far West, with any copies, or information concerning the films until the expiration of the leeway.

22

Not only did Waters pay nothing for this privilege, but no one else has a low price as those given to Waters by Mr. Gilmore during this period. This applied not only to films but to all apparatus handled by the Department.

Deponent further says that the Kinetograph Company was, during the years 1905, 1906, 1907 and 1908, known as the New York Selling Agent of the Kinetograph Department of the Edison Manufacturing Company, and in the same way the Kleine Optical Company was known as its Chicago Selling Agent.

23

The Kinetograph Company, to deponent's knowledge, repeatedly purchased both films and apparatus manufactured by other concerns than the Edison Manufacturing Company, who were close competitors of the Edison Manufacturing Company in the Kinetograph business. Among such concerns were Pathe Freres, the Vitagraph Company of America, S. Lubin of Philadelphia, the Biograph Company and the Nicholas Powers Moving Picture Machine Company of New York. Deponent called this fact to the attention of Mr. Gilmore but was told to do nothing about it. This was, as I remember the date, in 1904.

24

During the year 1904, the Kleine Optical Company of Chicago bought from the representative of Pathe Freres, of Paris, France, a small amount of film, about twenty to twenty five films. A similar amount was also purchased from the same company by Mr. Waters, which I mentioned to Mr. Gilmore. Mr. Gilmore immediately cancelled all arrangements with the Kleine Optical on the stated ground of their purchase from Pathe Freres and the Kleine Optical Company was cut off from representing the Edison Company, as its selling agent in Chicago. Before we had secured any

25

one else as a selling agent there, one day Mr. Gilmore, Mr. Waters and myself met in New York, either at Martin's restaurant on Fifth Avenue and 26th Street, or at the Fifth Avenue Hotel, on Fifth Avenue and 23rd Street, and the matter of a selling agency at Chicago was brought up. Mr. Gilmore said he wanted Waters to go out there and open an office and take the agency. Mr. Waters answered that he did not want to go out there himself, so far from New York, and he did not have anybody he could put in charge of the business there.

26

I said, off-hand and somewhat jestingly, what was the matter with my going out there for Waters and taking an interest in the business. Gilmore said "Well, why don't you?", and I said "I have not got the money to put in to run the business." Gilmore said, "We will furnish you the money." There was some further talk about it, which I do not exactly recollect, but it came to nothing.

27

Very shortly after, however, a branch office of the Edison Manufacturing Company was opened in Chicago, and Mr. Ernest A. Fenton, who was a witness in this case, was put in charge of it. Fenton was a half brother of Mr. Waters. He remained in charge of the Chicago office for about a year.

Mr. Waters, in spite of the establishment of a branch office of the Edison Manufacturing Company at Chicago, received the films some ten days to two weeks in advance of the Chicago office of the Company and exhibited, or had exhibited, such films in Chicago theatres before the Chicago office of the Company was supplied with such films, thus depriving other exhibitors and customers of the Edison

28

Company for the benefits of the first run, and depriving the Company of the opportunity of selling films to its other customers for such first runs.

This situation largely interfered with the deponent's soliciting business from other film exhibitors, or other concerns renting films, and resulted in loss of business to the Edison Manufacturing Company. This situation was repeatedly presented to Mr. Gilmore by deponent without avail, and the orders to give Waters the two weeks precedence reiterated.

29

After the retirement of Mr. Gilmore from the position of Vice-President and General Manager of the Edison Manufacturing Company, the matter of these privileges accorded Mr. Waters was taken up by the new acting head of the Company, Mr. Frank L. Dyer, and most of these special privileges to Mr. Waters were promptly cut off.

30

Deponent further says that at the time the Kinetograph Company was purchasing films and apparatus from outside firms, such as the Vitagraph Company and the Biograph Company, deponent called the attention of Mr. Gilmore to the matter that the Edison Manufacturing Company was prosecuting these companies for infringement of its patents on such apparatus (and subsequently such apparatus was held to be an infringement of the Edison patents) but the Kinetograph Company was so permitted by Mr. Gilmore to purchase films and apparatus from these companies in spite of that litigation.

At the end of the year 1907, in addition to all special rebates and lower prices given Mr. Waters, by the arrangements made with the Company, Mr. Gilmore awarded him

31 a special rebate on the purchase by him of films, during the preceding year, of approximately Three Thousand (3,000) Dollars, which rebate was not called for by any arrangement in existence with Mr. Waters. Deponent knows of no reason beneficial to the Edison Manufacturing Company why any such rebate should have been granted to Mr. waters on business already done. This was done by Mr. Gilmore's express orders without any consultation with deponent, and without deponent's knowledge of its being done until the matter had been placed upon the books.

32 Deponent further says that some time during the year 1907 in New York City, when deponent and said Gilmore were spending an evening together, said Gilmore told the deponent in terms that he had a financial interest in the business of the defendant Waters. Deponent answered "What do you think? Don't you think I know anything?"

Subscribed and sworn to
before me this 13th day
of May, 1912.

Alexander T. Moore

Theo. F. Sanders,
Notary Public, Kings County,
Certificate filed in New York County.

(Notarial
Seal).

Fol.1

SUPREME COURT
NEW YORK COUNTY.

-----x
JAMES H. WHITE and JOHN R. SCHERMERHORN,
Plaintiffs,
-against-
PERCIVAL L. WATERS,
Defendant.
-----x

STATE OF NEW YORK, :
COUNTY OF NEW YORK : ss.:

JAMES H. WHITE, being first duly sworn, deposes
and says:

That he is one of the above named plaintiffs,
and that he has read the annexed affidavits of Alexander
T. Moore, Richard J. Foard, Frederick R. Hasselman and
Arthur S. Cox.

Deponent further says that , ever since the
trial of this action, he has been seeking for evidence
that would establish that the testimony given by William
E. Gilmore on the trial of this action was untrue, and
deponent first heard of the statements now made by said
Foard, Hasselman and Cox on or about the 1st day of April
1912.

Deponent further says that he was advised by
Mr. Selden Bacon, his counsel in this case, that it would
be necessary, in moving for a new trial, to find not only
evidence of the untruth of the testimony given by said
William E. Gilmore upon the trial but also evidence that that
testimony had been given to the Court, on behalf of the
defendant, with knowledge on the part of the defendant that
the witness Gilmore was giving false testimony; and depo-

4 seeking
nment has been/for nearly two yearsto find evidence that
the defendant Waters knew the falsity of the testimony of
said Gilmore at the time it was given, and deponent has
been dilogently making inquiries in all directions where
he thought it possible that he would find such evidence.

He finally discovered on or about the 25th day of April,
1912, that Mr. Alexander T. Moore, who was Manager of the
Kinetograph Department of the Edison Manufacturing Company
from March 1904 to March 1909, had had various conversations
with the defendant and with said Gilmore bearing on the
question of Gilmore's interest with Waters, the substance
of which is now shown in the affidavit of said Alexander
Moore hereto annexed.

5 That thereupon deponent sought to secure an
affidavit from said Moore but until the 11th day of May,
1912, deponent was unable to get even any detailed state-
ment from said Moore of what evidence he could give; the
detailed statement of said Moore was finally secured on the
11th day of May, 1912, and reduced to writing, and verified,
as shown by the annexed affidavit, on the 13th day of May,
1912, which was the earliest date at which deponent could
procure the affidavit of said Moore.

6 During all the time since the original trial
of this action deponent has been consulting at frequent
intervals with the other plaintiff John R. Schermerhorn
with regard to similar efforts made by him to secure the
necessary testimony on which to base an application for a
new trial, and both said Schermerhorn and deponent have
been making constant efforts to secure the evidence which
they have now finally obtained, and which it was impossible
for them to obtain until this time.

7

Deponent further says that he reiterates his testimony given on the trial of this cause as to his obtaining permission from William E. Gilmore, as General Manager, and Vice-President of the Edison Manufacturing Company to go into business with the defendant Waters along with the plaintiff Schermerhorn, and also reiterates his denial of the testimony of said Gilmore that he called in this deponent and asked him if he had heard anything about rumors that some of the employees of the Edison Manufacturing Company were connected with Mr. Waters in the Kinetograph Company business; and deponent also reiterates his denial that this deponent had denied to said Gilmore his having such connection, and deponent reiterates as well his other testimony at the trial.

8

Deponent further says that he did not know at the time of the trial of this cause that said Moore could give any such testimony as is shown by his said affidavit. And the first suggestion deponent received that said Moore could have given testimony concerning any of the matters referred to in his said affidavit was received by deponent from one A. C. Abadie about the 20th of April, 1912; after that deponent had considerable difficulty in finding said Moore, who had moved several times, but deponent finally found him about April 25th, 1912, and made repeated efforts to get him to tell deponent what he knew, deponent going to his (Moore's) house seven or eight times between April 25th, 1912, and May 11th, 1912, and finally succeeded in eliciting the facts from him only on May 11th, 1912.

9

10

The evidence of said Board, said Hasselman, and said Cox could not, of course, have been produced at the trial.

Subscribed and sworn to
before me this 13th day of May, 1921

Jas.H.White

James C. Kellogg,
Notary Public 103
New York County

(Notarial
Seal)

SUPREME COURT
NEW YORK COUNTY

----- -X
JAMES H. WHITE and JOHN R. SCHERMEERHORN, :
Plaintiffs, :
-against- :
PERCIVAL L. WATERS, :
Defendant. :
----- -X

STATE OF NEW YORK :
: ss.:
COUNTY OF NEW YORK :

JOHN R. SCHERMEERHORN, being first
and says:

2 That he is one of the above named plaintiffs, and
that he has read the annexed affidavits of Alexander T.
Moore, Richard J. Foard, Frederick R. Hasselman and Arthur
S. Cox.

3 Depoent further says that ever since the trial
of this action he has been seeking for evidence that would
establish that the testimony given by William E. Gilmore
on the trial of this action was untrue, and for evidence
that the defendant Waters, at the time of the giving of
such testimony by said William E. Gilmore, knew that the
same was untrue.

Depoent long sought vainly for any evidence out-
side of his own testimony and that of Mr. White on the
trial of this action of the untruth of the testimony of Mr.
Gilmore, though exercising every effort.

Depoent finally learned after the 1st of
January, 1912, from Messrs. Foard, Cox and Hasselman that

4 Mr. William E. Gilmore had made some very peculiar statements to them concerning his testimony on the trial of the above entitled action. It was sometime after that before deponent could secure from any one of the three an exact statement as to what these statements were, and it was not until about the 20th day of March, 1912, that deponent was able to get from any one of them any exact statement of what it was that said Gilmore had said.

Deponent then promptly brought them to the office of deponent's attorney in this case where their affidavits were taken one after another. Deponent, of course, at the time of the trial could know nothing of the testimony that could be given by these three gentlemen.

5 After deponent had ascertained that Messrs. Cox, Foard and Hasselman could give evidence that the testimony given by Mr. Gilmore at the trial was untrue, deponent was advised by his counsel herein, Mr. Selden Bacon, whose office is at 49 Wall Street, New York, and who resides in the Town of Mt. Pleasant, Westchester County, New York, that he must, in addition to any statements that Messrs. Cox, Foard and Hasselman could make, secure evidence that Mr. Waters knew that Mr. Gilmore was giving false testimony in the case.

6 Deponent had already been making efforts to secure evidence as to Mr. Waters' knowledge but had up to that time been unable to find any.

Deponent has during the preceding two years communicated frequently with his co-plaintiff White and both deponent and his said co-plaintiff had searched every where they thought it likely that they could obtain any

77

testimony to that effect without avail.

During the month of April, 1912, Mr. White informed deponent that he had heard that Mr. Alexander T. Moore could probably give some evidence, and deponent has been engaged up to the 11th of May, 1912, with said White in trying to find said Moore and secure his affidavit.

Deponent was entirely ignorant at the time of the trial of this cause, and thereafter until informed by said White, late in April, 1912, that said Alexander T. Moore could give any evidence relating to any question arising in the case.

8

Deponent did not see the said Moore after the year 1907 or 1908 until the 11th day of May, 1912, to have any conversation with him, and on the occasion of deponent's meeting him on the 11th of May, 1912, by previous arrangement made through Mr. White, said Moore gave the statement shown in his annexed affidavit.

9

Deponent further says that since the trial of this case, which occurred in the month of May, 1910, deponent has been in conference with his attorney Mr. Bacon very many times with regard to the possibilities of a way to find such testimony affecting said Waters and said Gilmore and what possible avenues there were of finding such testimony. With the exception of the summer and early fall of 1911, during which time Mr. Bacon was almost continuously absent from his office, there has scarcely been a single month when deponent has not conferred with said Selden Bacon over possible avenues of finding the testimony.

Deponent further says that he reiterates his testimony given on the trial of this cause as to his obtaining permission from William E. Gilmore, as General Mana-

10 ager and Vice-President of the Edison Manufacturing Company to go into business with the defendant Waters along with the plaintiff White and also reiterates his denial of the testimony of said Gilmore that he called in this deponent and asked him if he had heard anything about rumors that some of the employees of the Edison Manufacturing Company were connected with Mr. Waters in the Kinetograph Company business, and deponent also reiterates his denial that this deponent had denied to said Gilmore his having such connection, and deponent reiterates as well his other testimony at the trial.

Deponent's first suggestion that said Moore could give any such testimony, as is contained in his annexed affidavit, came from Mr. James H. White.

11 Subscribed and sworn to before John R. Schermerhorn.
me this 13th day of May, 1912.

Arthur Watson,

Notary Public Rockland Co.,
Cert. filed in New York Co., No. 32
(Notarial Seal).

Vol.1.

S U P R E M E C O U R T ,

N E W Y O R K C O U N T Y .

JAMES H. WHITE and JOHN R. SCHERMERHORN,
Plaintiffs, :

-against- :

PERCIVAL L. WATERS,
Defendant. :

STATE OF NEW YORK;)
COUNTY OF NEW YORK,) ss:

SELDEN BACON, being first duly sworn, deposes
and says:

That he is the attorney for the above named plain-
tiffs in the above entitled action.

That this action was begun on the 29th day of
January, 1909, and the complaint was served on the defendant
on that day. The answer to the complaint was served
on the 6th day of March, 1909, and thereafter, by stipula-
tion, an amended answer was served on the 7th day of March,
1910.

Deponent further says that he was retained as
counsel in the case along with the original attorney James
E. Walsh about the time of the commencement of the action,
and that said James E. Walsh died thereafter, to wit, on
December 26th, 1910, and on January 11th, 1911, deponent
appeared as attorney for plaintiffs in lieu of said James
E. Walsh, deceased.

The action was tried before Hon. Vernon M. Davis,
a Justice of this Court, without a jury, on the 4th, 5th,
and 6th days of May, 1910, deponent appearing as trial coun-
sel for plaintiffs.

4 That thereafter, and on the 27th day of May, 1910, Justice Davis filed his opinion in the case, a copy of which appears in the record on appeal herein, and thereafter, and on the 17th day of June, 1910, judgment was entered in this Court dismissing the complaint.

 Thereafter, and on or about the 14th day of July, 1910, an appeal from the said judgment was taken to the Appellate Division for the First Department and thereafter a full case, containing all the evidence and proceedings had upon the trial was duly settled by order of Justice Davis, to wit, on or about the 11th day of January, 1911, and on that day an order was entered directing that the printed record on appeal be filed in the Appellate Division. That after the appeal was there heard, to wit, on the day of June, 1911, the judgment was affirmed by the Appellate Division without opinion.

5

 Deponent further says that ever since the trial in May, 1910, the plaintiffs have been consulting with deponent as to the possibility of finding additional evidence disproving the testimony of William E. Gilmore, that said Gilmore did not give his assent to their entering into business with the defendant Waters in the Kinetograph Company and his testimony that he had never had any business relations in the way of being interested in business with the defendant Waters directly or indirectly.

6

 Plaintiffs have repeatedly consulted with deponent as to possibilities of tracing out evidence, and, since May, 1910, to deponent's best recollection, not a single month has passed in which one or the other of plaintiffs has not consulted deponent, either personally or by letter, concerning the matter of finding such testimony.

7

That the procuring of outside evidence concerning transactions claimed to have passed exclusively between said Gilmore and these plaintiffs was naturally a matter of extreme difficulty, and any evidence was necessarily of such a character, and to be derived from such sources, that the plaintiffs had no specific data to enable them to go to any particular place to find such testimony, or seek out any particular persons.

8

In the same way, any evidence that the defendant, in offering the testimony of said Gilmore, was knowingly offering untrue testimony, was extremely difficult to procure, and has finally been procured only by careful inquiry in numerous directions.

Deponent further says that this suit was brought by the plaintiffs for the dissolution of the alleged partnership between the plaintiffs and defendant and for an accounting from the defendant. That in the opinion signed by Justice Davis, he says:

9

"I find that there was a partnership existing between the parties. But whether the plaintiffs are in a position to entitle them to the intervention of a Court of equity to decree an accounting is another question. They entered into this business relation with the defendant without the knowledge or consent of their employer, the Edison Company. They claim that the General Manager, Gilmore, gave his assent, but the latter denies this, and his denial is more weighty as evidence than the testimony of the interested plaintiffs on this point. Moreover, Mr. Gilmore says not only that he gave no consent, but that the plaintiffs assured him that they had no connection with the business carried on by the defendant Waters, and other witnesses testify to a similar declaration by the plaintiff White -----.

"The contract sued upon, when reduced to its simplest terms, amounts to an agreement on the part of the defendant to pay the plaintiffs a share of his profits in consideration of their conducting a part of their employer's business in his (Waters) interest. Such a contract is incompatible with the fidelity which the plaintiffs owed to their employer's interest, is against the public policy, and cannot be enforced in a Court of Equity."

10 The plaintiffs, as deponent understands the case,
were defeated solely because of the testimony of the de-
fendant Gilmore that neither White nor Schermerhorn ever
asked him such a question as whether he had any objection
to their entering into business relations with Mr. Waters
and that he absolutely did not say to either one of them,
directly or indirectly, that either he or Mr. Edison had
no objection to either of them making such an arrangement
with Mr. Waters; that he never said that he objected to
11 their signing articles of partnership because they would
have to be recorded and made public, or anything of that
kind; that he never knew that articles of partnership were
contemplated between plaintiffs and defendant, and his fur-
ther testimony that he had never had any business relations
in the way of being interested in business with Mr. Percival
L. Waters, directly or indirectly.

 Deponent further says that, at the time the tes-
timony of said Gilmore was given, at the trial of the said
action, the defendant Waters was in the Court room, very
near the witness, and in a position where he could hear
12 every word stated by the witness Gilmore.

 That the testimony of said Gilmore that he never
had any business relations in the way of being interested
in business with the defendant Waters, directly or indirect-
ly, was testimony given on his direct examination by the
counsel for the defendant, and as indicated by the opinion
of Justice Davis, was the cause of the great weight given
to his testimony as against the direct testimony of the two
plaintiffs, which he disputed.

Deponent further says that annexed hereto, and hereby made a part of this affidavit, is a copy of the opinion given by Justice Davis in deciding the case.

Deponent further says that the matters stated by Messrs. Hasselman, Cox, Foard and Moore, in their annexed affidavits herein, were not known to deponent at the time of the trial of this cause, and have been subsequently discovered since the trial of the said cause as a result of long continued investigations made by the two plaintiffs under deponent's direction, as stated in their affidavits, Subscribed and sworn to before me)

this 15th day of May, 1912.

) SELDEN BACON.

Florence M. Epworth,
Notary Public Kings County,
Cert. filed in New York County.

Notarial Seal

LEGAL DEPARTMENT RECORDS PHONOGRAPH

This material consists of correspondence, court documents, and other items relating to patent interference proceedings and infringement suits, contract disputes, and other legal actions involving Edison's phonograph. Included are items pertaining to the protracted litigation over phonograph sales rights. Also included are documents dealing with musical copyright, corporate organization, embezzlement, and the unlicensed use of Edison's name. Most of the selected items cover the years 1899-1910, but a few case files begin during the mid-1890s and some continue into the 1910s. Approximately half of the cases relate to litigation involving the National Phonograph Co. or other Edison interests and the American Graphophone Co. or its associated sales company, the Columbia Phonograph Co., General. Other cases deal with the disposition of litigation between Edison and the New York Phonograph Co.; the supply of Edison phonographs to Europe; patent infringement by Pathé Frères in France; and Mexican copyright law. In addition, there is a case file containing information concerning price maintenance litigation pursued by the National Phonograph Co. and its affiliates.

Less than 10 percent of the documents have been selected. The selected items reflect Edison's personal involvement in legal matters, detail experimental work done by Edison or his assistants, or broadly pertain to matters of corporate organization and stratagems employed against competitors. The documents have been arranged in the following order:

Correspondence

- General
- Douglas Phonograph Company
- Foreign Copyright
- Higam, Daniel
- Infringement Searches [not selected]
- Petit, Ademor N. [not selected]
- Trademarks and Trade Names [not selected]
- 200-Thread Record

Interference Proceedings

- Macdonald v. Edison* (No. 20,775)
- Edison v. Petit v. Capps* (No. 22,202); *Edison v. Jones* (No. 22,203)
- Edison v. Smith* (No. 25,460)
- Edison v. Macdonald* (No. 25,677)

Case Files

- American Graphophone Company v. National Phonograph Company* [2 cases]
- American Graphophone Company v. National Phonograph Company and Blackman Talking Machine Company*
- American Graphophone Company v. Cleveland Walcutt et al.*
- Columbia Phonograph Company v. National Phonograph Company and William J. Rahley; Columbia Phonograph Company v. John E. Whitson and Walter J. Whitson and the National Phonograph Company*
- Thomas A. Edison v. Frederic M. Prescott*
- Thomas A. Edison et al. v. New York Phonograph Company et al.; New York Phonograph Company v. Siegel-Cooper Company*
- Thomas A. Edison, Inc. v. United States Phonograph Company*
- Edison Phonograph Works v. Edison United Phonograph Company; Edison United Phonograph Company v. Edison Phonograph Works*
- Edison United Phonograph Company v. Thomas A. Edison et al.*
- José Elizondo et al. v. Jorge Alcalde*
- International Graphophone Company v. Thomas A. Edison et al.*
- George Croyden Marks v. Pathé Frères*
- National Phonograph Company v. American Graphophone Company* [2 cases]; *New Jersey Patent Company v. American Graphophone Company*
- National Phonograph Company v. American Graphophone Company and Columbia Phonograph Company, General* [3 cases]
- National Phonograph Company v. Lambert Company*
- National Phonograph Company v. Lambert Company and Thomas B. Lambert; Edison Phonograph Company v. Lambert Company and Thomas B. Lambert*
- New Jersey Patent Company v. Columbia Phonograph Company, General*
- New York Phonograph Company v. National Phonograph Company et al.*
- United States of America v. James L. Andem*
- United States of America on the Relation of National Phonograph Company v. Frederick I. Allen, Commissioner of Patents*
- Price Maintenance Cases

General

This folder contains documents relating to corporate consolidation and other matters. The selected documents cover the years 1899, 1903-1904, and 1910. Included is correspondence with Rosanna Batchelor, widow of Edison's former associate, Charles Batchelor, and with Newark attorney Robert H. McCarter regarding Edison's proposed purchase of Mrs. Batchelor's stock in Edison Phonograph Works and the feasibility of including the Works in the consolidation. There are also a list of cases involving the Edison interests and the American Graphophone Co. prior to December 1896; an enumeration of cases pending and under consideration in August 1910; and an agreement between the American Graphophone Co. and the National Phonograph Co. regarding a patent for large-diameter cylinder records.

Douglas Phonograph Company

This folder contains documents relating to the formation of the Douglas Phonograph Co., a New York corporation organized as a successor to Douglas & Co. The company was formed in November 1904 and dealt in Victor talking machines as well as Edison phonographs. It was controlled by the National Phonograph Co. The selected items cover the years 1904 and 1906. They consist of a letter from New York attorney Frank E. Bradley to Frank L. Dyer regarding the reorganization of Douglas & Co; minutes of the first meeting of the incorporators and subscribers of the Douglas Phonograph Co.; and the president's and treasurer's report for the year ending October 31, 1906.

Foreign Copyright

This folder contains correspondence and other documents relating to musical copyright matters in Great Britain, Germany, and other countries. The selected documents cover the period 1908-1909. Among the correspondents are Paul H. Cromelin and M. Dorian of the Columbia Phonograph Co. and Horace Pettit of the Victor Talking Machine Co. The documents pertain to copyright provisions in British law and under the Berne Convention of 1886 and to cooperation between the National Phonograph Co. and its competitors, Columbia and Victor, on the foreign copyright issue. Included is a report by M. Dorian prepared for the Berlin Conference for the Revision of International Copyright Laws in October 1908, as well as a printed copy of Frank L. Dyer's testimony before the British Parliament.

Higham, Daniel

This folder contains correspondence and other documents relating to Daniel Higham's patents on mechanical amplification devices and to Edison's interest in his work. The selected documents cover the period 1902-1904. Among the correspondents are Higham, Edison, and their respective patent attorneys, John B. Moran and the firm of Dyer, Edmonds, and Dyer. Included is an option agreement between Higham's High-Am-O-Phone Co. and the National Phonograph Co., along with numerous items pertaining to the execution and disposition of the agreement.

Infringement Searches [not selected]

This folder contains correspondence, printed patents, and other documents relating to the evaluation of non-Edison patents. Included are materials collected in regard to patents by John F. Barber, John C. English, Charles J. Kintner, Albert K. Keller, Thomas H. Macdonald, and Abner M. Seeley. Among the patent claims researched by the Legal Department are those pertaining to nickel-in-the-slot devices, feed mechanisms, celluloid records, a return device, a record box, a tapering tone arm, and other technical modifications.

Petit, Ademor N. [not selected]

This folder contains correspondence and other documents relating to patents obtained by Ademor N. Petit and others for improvements in cylinder records. The correspondents include Petit, Frank L. Dyer of the Legal Department, the United States Patent Office, patent agent George Croyden Marks, and the attorneys involved in transferring assignment of Petit's patents from the International Phonograph and Indestructible Record Co., Ltd., to the New Jersey Patent Co.

Trademarks and Trade Names [not selected]

This folder contains correspondence and other documents relating to the labeling of phonographs and records and to the use of specific words as trademarks or trade names in the United States and elsewhere. Included are discussions of the words "amberola," "cygnet," "phonograph," "conqueror," "fireside," "home," and "Victor." The correspondents include Frank L. Dyer and other legal representatives of the National Phonograph Co., as well as representatives of the American Graphophone Co. and the Victor Talking Machine Co.

200-Thread Record

This folder contains correspondence and other documents relating to Edison's efforts to obtain American and foreign patents for his 200-thread record, which he manufactured as the "Amberol" record. The selected documents cover the period 1908-1910. Among the correspondents are Edison, Frank L. Dyer and Dyer Smith of the Legal Department, inventor Ademor N. Petit, and British patent agents Marks & Clerk. Included are affidavits by Edison and Smith regarding the development of the longer-playing record, as well as correspondence concerning claims by the Premier Manufacturing Co., Ltd., of Great Britain to have made similar records.

LEGAL DEPARTMENT RECORDS PHONOGRAPH - CORRESPONDENCE

These folders contain correspondence and other documents relating to legal matters involving Edison's phonograph. The selected documents cover the period 1899-1910. Among the correspondents are Edison, Frank L. Dyer, Herbert H. Dyke, Howard W. Hayes, and other members of Edison's legal staff. Some material pertains to labeling phonographs and records, particularly to names or works used as trademarks and trade names. Some items concern existing patents and their relation to perfected or proposed innovations by Edison, his employees, or others. Research subjects include nickel-in-the-slots devices, modified reproducers, attachments, a feed mechanism, a tapering tone arm, a return device, and "indestructible" records. The patent holders include Edison, Thomas H. Macdonald, Ademar N. Petit, and Peter Weber. In addition, there is material dealing with proposed litigation, along with items that were collected in anticipation of legal agreements or disputes. Some of the documents pertain to the formation of the Douglas Phonograph Co. and to contracts with sales agents. Other items concern research done on state tax codes, state laws regarding hawkers and peddlers, the municipal boundaries of Belleville, New Jersey, and installment sales contracts. Also included are letters and interoffice communications regarding Daniel Higham's mechanical amplification patents; the development and sale of celluloid and 200-thread records; and musical copyright in Great Britain and under the Berne Convention.

**Legal Department Records
Phonograph - Correspondence**

General

This folder contains documents relating to corporate consolidation and other matters. The selected documents cover the years 1899, 1903-1904, and 1910. Included is correspondence with Rosanna Batchelor, widow of Edison's former associate, Charles Batchelor, and with Newark attorney Robert H. McCarter regarding Edison's proposed purchase of Mrs. Batchelor's stock in Edison Phonograph Works and the feasibility of including the Works in the consolidation. There are also a list of cases involving the Edison interests and the American Graphophone Co. prior to December 1896; an enumeration of cases pending and under consideration in August 1910; and an agreement between the American Graphophone Co. and the National Phonograph Co. regarding a patent for large-diameter cylinder records.

Less than 5 percent of the documents have been selected.

HOWARD W. HAYES,
GEORGE H. LAWERT,
COUNSELLOR AT LAW

[PHOTOCOPY]

TELEPHONE NO. 503

LAW OFFICES
HAYES & LAWERT,
ROOMS 201-202, PRUDENTIAL BUILDING
765 BROAD STREET

NEWARK, N. J. November 18th., 1899

Edison Phonograph Works,
Orange, N. J.

Dear Sirs:-

I am in receipt of your favor of the 13th. inst. enclosing copies of the settlement between the United Phonograph Company and yourselves and Mr. Edison. It corresponds with my memory of the matter, and is in extremely good shape. In my judgment this settlement will go far toward preventing the Edison United Phonograph Company from ever again bringing suit against the Works for alleged violation of contract.

The rule of our Court of Chancery is, that if a bill is dismissed without a provision that the case may be brought up again, it is a final settlement of the matter, and the complainant must show very good grounds before he can be relieved of the effect of the settlement. As you may remember, one of the grounds urged by the American Graphophone Company should not get a preliminary injunction against the United States Phonograph Company. was ^a ~~the~~ similar settlement of the early case against the Company. The proposition struck the counsel of the American Graphophone Co. with such force that the motion for the preliminary injunction was withdrawn.

ENCLOSURE.

Yours very truly,

Howard W. Hayes



Howard W. Hayes
See # 3. Rfc ✓

147
License Agreement

American Graphophone
Company

with

National Phonograph
Company.

Dated March 10th 1903

HOWARD W. HAYES,
COUNSELLOR AT LAW,
705 BROAD STREET,
NEWARK, N.J.

ROOM 201 PRUDENTIAL BUILDING
705 BROAD STREET,

SHOULD BE KEPT IN THE FILES OF THE NEWARK, N. J.

2-392.

D
1903

Phen. - Agreements

RECEIVED for record March 13, 1903. and recorded in

66 page 499, of Transfers of Patents.

IN TESTIMONY WHEREOF I have caused the seal of the
Patent Office to be hereunto affixed.

Edw. F. J. Allen
6764
Commissioner of Patents.

L I C E N S E A G R E E M E N T .

("GRAPHOPHONE GRAND")

WHEREAS the AMERICAN GRAPHOPHONE COMPANY, a corporation duly organized under the laws of West Virginia and having its principal office in Washington, District of Columbia, (hereinafter called the licensor) is the grantee and owner of Letters Patent No. 714,651, dated November 25, 1902, and known as the "GRAPHOPHONE GRAND PATENT", and

WHEREAS the NATIONAL PHONOGRAPH COMPANY, a corporation organized under the laws of New Jersey and having its principal office in Orange, in said State, (hereinafter called the licensee) is desirous of acquiring a license to manufacture, to use, and to sell machines and records in accordance with said patent;

THEREFORE IN CONSIDERATION OF Five Dollars (\$5.00), in hand paid to the licensor by the licensee, receipt of which is hereby acknowledged, the licensor has granted, and does hereby grant, to the licensee the right to manufacture, use and sell, during the term of said patent, machines, appliances and sound-records covered by said patent, this right to extend to foreign countries where the licensor or its grantors or grantees or successors have obtained, or may hereafter obtain, patent protection for the said invention.

IT IS HEREBY AGREED between the parties, as a part consideration for this license, that the licensee will forthwith discontinue opposition to the grant of the patent applied for in Germany, and that all legal proceedings relating to said patent shall be dismissed. The amount paid in consideration of this license includes the entrance fee and royalties established by the licensor for licenses under German patent No. 130,949.

THIS LICENSE is personal to the licensee and not trans-

(RECEIVED BY THE SECRETARY OF THE
TREASURY DEPARTMENT)

(2)

ferable.

THE LICENSOR hereby releases the licensee, and all its
vendees, from claims for past damages or royalties for the
use of said invention and agrees upon request to execute to
the licensee all further instruments necessary to carry into
effect this agreement, and warrants that it is the owner of
said invention and the patent granted thereon.

IN TESTIMONY WHEREOF the parties hereto have signed this
agreement this 10th day of March 1903.

Attest:

(SEAL)

By J. R. Randolph
Secretary.

Attest:

By [Signature]
Secretary

National Phonograph Company
By W. E. Arnold
President.

American Graphophone Co.
By [Signature]
President.

Harvard Stages
in American Graphophone
Co.

420

RICHARD N. DYER
FRANK L. DYER
LEONARD H. DYER
JOHN ROBERT TAYLOR

LAW OFFICES
OF

DYER & DYER
SPECIALTY: PATENTS AND CORPORATIONS
31 NASSAU STREET

CHAS. ADAMS
"VERMERE, NEW YORK."
TEL. NO. 2510 CHAS.

NEW YORK. Oct. 13th, 1904.

Frank L. Dyer, Esq.,
Edison Laboratory,
Orange, N. J.

Dear Sir:-

The following is a list of all suits appearing upon our docket brought by the American Graphophone Co. against the Edison Phonograph Works and allied interests as well as all suits brought by the Edison Phonograph Co. against American Graphophone Co., and its allied concerns, previous to Dec. 1896.

SUITS BROUGHT IN U. S. CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Thomas A. Edison v. James O. Clephane. Suit brought Dec. 13th, 1895 on patents Nos. 414,761 and 430,274. Discontinued by consent Dec. 9th, 1896.

Edison Phonograph Co. v. James O. Clephane, two suits brought Dec. 13, 1895, on patents Nos. 382,462 and 430,278 respectively and discontinued by consent Dec. 9th, 1896.

Thomas A. Edison v. G.W. Saxton. Suit brought Feb. 8, 1895, on patent No. 414,761. Our docket does not show the disposition of this case but it was probably discontinued.

Edison Phonograph Co. v. G. W. Saxton, (Manager Union Talking Machine Co.), two suits brought Feb. 8, 1895 on patents Nos. 382,462, and 430,278 respectively. Our docket does not show the disposition of the cases. They were probably discontinued.



Frank L. Dyer, Esq., --2.

American Graphophone Co. vs. Cleveland Walcutt, Walter H. Miller and Henry J. Hagan. Suit brought Nov. 13, 1894 and discontinued by consent Dec. 9, 1896. Our docket does not show on what patents the bill was based.

National Phonograph Co., Edison Phonograph Works, and New York Phonograph Co. vs. Columbia Phonograph Co. and E. D. Easton. Two separate suits brought Oct. 9th, 1896. Both discontinued Dec. 9, 1896. First suit was brought on patent No. 382,416, and others, the second suit being based upon patent No. 386,974 and others.

SUITS BROUGHT IN SUPREME COURT, DISTRICT OF COLUMBIA.

The Volta Graphophone Co. and American Graphophone Co. vs. Columbia Phonograph Co. and E. D. Easton. Suit brought Feb. 14, 1893, prima facie testimony taken, Dyer & Seely appearing for defendants, but withdrew on their own motion some time after Aug. 4, 1894.

Edison Phonograph Co. vs. American Graphophone Co., S. M. Bryan and E. D. Easton. 9 different suits were commenced in June 1893. Were afterwards discontinued probably about Dec. 1896.

Frank L. Dyer, Esq., --3.

SUITS BROUGHT IN U. S. CIRCUIT COURT, DISTRICT OF NEW JERSEY.

American Graphophone Co. vs. U. S. Phonograph Co., D. H. Emerson and G. E. Tewksbury. Suit brought Oct. 15, 1894, on patents Nos. 341,214, and 341,288. Case was argued at final hearing after the taking of proofs on Sept. 15th and 16th, 1895, decision being reversed by the Court. Judge afterwards died before rendering decision. Discontinued by consent Dec. 10th, 1896.

Edison Phonograph Co. v. E. O. Rockwood. 3 separate suits were brought Dec. 13th, 1895 and discontinued Dec. 12, 1896.

The Volta Graphophone Co. and American Graphophone Co. vs. Edison Phonograph Works, suit brought Feb. 20, 1893, on patents No. 341,214, and 341,288. Discontinued by consent Dec. 12, 1896.

SUITS BROUGHT IN THE U. S. CIRCUIT COURT FOR THE DISTRICT OF CONNECTICUT.

Edison Phonograph Co. vs. Thomas H. Macdonald. Nine separate suits were brought June 8, 1893, prima facie proofs taken in each one and a consent decree entered Dec. 1894. Suits were brought respectively on patents Nos. 382,416; 386,974; 393,966; 393,967; 393,968; 400,646; 400,647; 430,278; 484,583. A further suit was brought against the defendant

Frank L. Dyer, Esq., --4.

June 28, 1893, on patent No. 499,879, which was disposed of in the same manner after prima facie proofs had been taken.

SUITS BROUGHT IN U. S. CIRCUIT COURT, EASTERN DISTRICT OF
PENNSYLVANIA.

American Graphophone Co. vs. E. A. Hawthorne and
Horace Shevele (Standard Typewriter Exchange), suit brought
Jan. 22, 1895, discontinued Dec. 1896.

In all the above cases except where otherwise stated,
the suits were disposed of after filing of replication without
any intermediate steps being taken. In those suits where no
patent numbers are given our docket fails to give us any infor-
mation on what patents the suits were based.

Yours very truly,

Wm. Dyer

JRT/W

McCARTER & ENGLISH
COUNSELLORS AT LAW
PRUDENTIAL BUILDING - 705 BROAD ST.
NEWARK, N. J.

ROBERT H. McCARTER CONOVER ENGLISH

ARTHUR F. EDGER J. G. SHIPMAN
TELEPHONE NO. 2025 MARKET

Newark, N. J. June 9th, 1910.

H. H. Dyke, Esq.,
c/o National Phonograph Company,
Orange, N. J.

6

Dear Sir:

I have your favor of the 7th. I see no reason why, particularly in view of the fact that you will get the unanimous consent of the stockholders of both companies, the National Phonograph Company and the Edison Manufacturing Company should not be merged as proposed.

Yours very truly,



RECEIVED.
JUN 20 1910
FRANK L. DYER

Dyer = 6
33 WEST TWENTY-FIFTH STREET
Pleas go ahead without
her - This is his style.
My dear Mr. Colburn.
Your letter of May
20th was received and
I am much obliged
to you for giving the
information asked for.
In regard to your
offer of an exchange
of bonds for stock I
think I would rather

not accept it at the present
time.

I have not been at all
well and hope to leave
town shortly for a much
needed rest and change
and prefer to let matters
stand just as they are
until the fall.

Yours very truly
Rosanna Batchelor

June eighteenth 1910.

Aug. 15, 1910.

Mr. Dyke:

Mr. Dyer has made an assignment of the various ^{pending} and prospective suits as indicated upon the accompanying list, which please return after noting the same. The annexed letter from Mr. Fay refers to our letter of the 9th inst., alleging infringement of Patent No. 964,221. He is mixed up on this, as the letter referred to notifies his client of infringement of Weber Patent No. 932,202. Mr. Fay was previously, to-wit, on July 27, 1910, notified of the infringement ^{of} Patent No. 964,221 and acknowledged receipt of this letter, so that we know both letters of notification reached the United States Phonograph Company. They were both sent by registered mail and the receipts should be looked up and put in the correspondence files of these prospective suits. I hand you herewith five copies of Patent No. 932,202.

DH/KGK

De los Holden

[ENCLOSURE]

(a)

Suits against or by American Graphophone Company and
Columbia Phonograph Company, Gen'l.

- Dyke*
Dyke
Smith
Dyke
- (1) West Virginia suits - three suits upon the molding of phonograph records, handled as one suit - Mr. Dyke.
 - (2) Suit on Smith patent covering swiveled stylus lever - Mr. Dyke.
 - (3) Suit on Edison button ball patent - Mr. Smith.
 - (4) Proposed suit on Edison 200 thread record patent.

(b)

Suits against United States Phonograph Company

- Smith*
Smith
Dyke
Dyke
Smith
- (5) Suit on Edison button ball patent.
 - (6) Suit on Weber patent covering stylus for 200 thread record.
 - (7) Proposed suit on Edison 200 thread record patent.
 - (8) Proposed suit on Weber patent No. 932,202, covering machine having two feed screws.
 - (9) Interference, Lewis vs. McNulty - Mr. Smith.

(c)

Suits Against Indestructible Phonographic Record Co.

- Smith*
Holden
- (10) Suit on Edison patent for expanding blank, No. 713,209 - Mr. Church, assisted by Mr. Smith.
 - (11) Suit on Edison vacuume deposit process - Mr. Holden.

(d)

Victor Talking Machine Company

- Holden*
Holden
- (12) Application for cancellation of trade mark "Amberola"
 - (13) Interference - Dennison vs. Pierman - Mr. Holden.

[ENCLOSURE]

(e)

Bates Machine Company

- Small* (14) Suit for unfair competition, including an accounting - Mr. Small.
- Small* (15) Suit for unfair competition, including contempt proceeding - Mr. Small.

(f)

Banks Electric and Manufacturing Co.

- Holden* (16) Suit on Dodge patent.

(g)

Waterbury Battery Company

- Holden* (17) Proposed suit on Dodge patent.
- Holden* (18) Proposed suit on patent to be granted on zinc plate.

(Signed) Delos Holden

D. H.

DH-JS

[ENCLOSURE]

*Duplicate - Legal
Box 26
Folder
4
with letter dated
aug 15, 1910*

(a)

Suits against or by American Graphophone Company and
Columbia Phonograph Company, Gen'l.

- My file
Dyke
Smith
Dyke*
- (1) West Virginia suits - three suits upon the molding of phonograph records, handled as one suit - Mr. Dyke.
 - (2) Suit on Smith patent covering swiveled stylus lever - Mr. Dyke.
 - (3) Suit on Edison button ball patent - Mr. Smith.
 - (4) Proposed suit on Edison 200 thread record patent.

(b)

Suits against United States Phonograph Company

- Smith
Smith
Dyke
Dyke
Smith*
- (5) Suit on Edison button ball patent.
 - (6) Suit on Weber patent covering stylus for 200 thread record.
 - (7) Proposed suit on Edison 200 thread record patent.
 - (8) Proposed suit on Weber patent No. 932,202, covering machine having two feed screws.
 - (9) Interference, Lewis vs. McNulty - Mr. Smith.

(c)

Suits Against Indestructible Phonographic Record Co.

- Smith
Holden*
- (10) Suit on Edison patent for expanding blank, No. 713,408 - Mr. Church, assisted by Mr. Smith.
 - (11) Suit on Edison vacuum deposit process - Mr. Holden.

(d)

Victor Talking Machine Company

- Holden
Holden*
- (12) Application for cancellation of trade mark "Amberola".
 - (13) Interference - Dennison vs. Pierman - Mr. Holden.

[ENCLOSURE]

(e)

Bates Machine Company

- Small* (14) Suit for unfair competition, including an accounting - Mr. Small.
- Small* (15) Suit for unfair competition, including contempt proceeding - Mr. Small.

(f)

Banks Electric and Manufacturing Co.

- Holder* (16) Suit on Dodge patent.

(g)

Waterbury Battery Company

- Holder* (17) Proposed suit on Dodge patent.
- Holder* (18) Proposed suit on patent to be granted on zinc plate.

(Signed) Delos Holder

D. H.

DN-JS

October 11, 1910.

Robert H. McCarter, Esq.,
Prudential Building,
Newark, N. J.

Dear Sir:-

RE: CONSOLIDATION OF EDISON COMPANIES.

With reference to the proposed inclusion of the Edison Phonograph Works in the consolidation of the Edison Companies, the facts, briefly stated, are as follows:-

1. The Edison Phonograph Works was incorporated under the Corporation Act of 1875 and amendments thereto, the date of its incorporation being April 30, 1888. I enclose a copy of the Certificate taken from the Minute Book. As you will see from such copy there is no provision made therein for enabling a majority of the stockholders, however great, to dispose of the property of the Works as an entirety.

2. The original stock of the Edison Phonograph Works was three hundred thousand dollars (\$300,000.) and was later increased to six hundred thousand dollars (\$600,000.), the par value of the shares being one hundred dollars (\$100.) each. The legal title to all the shares is held or controlled by Mr. Edison with the exception of two hundred forty-eight (248) shares which are held by Mrs. Batchelor, the widow of Charles Batchelor.

Robert H. McCarter, Esq., -- Page 2 -- 10/11/'10.

3. Fifty-two percent. (52%) of the capital stock, or three hundred twelve thousand dollars (\$312,000.), was issued to Mr. Edison in return for patent and other rights, pursuant to the provisions of Paragraph "Third" of the agreement of May 12, 1888, between said Edison and said Works, copy of which is also enclosed herewith. Pursuant to the provisions of Paragraph "Fourth" thereof, thirty-eight percent. (38%) of this 52% of stock, or eleven hundred eighty-five and six-tenths (1,185 6-10) shares of the par value of one hundred eighteen thousand five hundred sixty dollars (\$118,560.), was deposited under trust agreement with the Mercantile Trust Co. There are two agreements between Mr. Edison and the Mercantile Trust Co. -- one dated January 21, 1890, and the other dated April 8, 1890 -- and I am also handing you copies of these agreements herewith. By an agreement dated April 8, 1890, between Mr. Edison and Charles Batchelor, of which I likewise send you copy, Mr. Edison agreed to hold one-tenth (1-10) of the shares deposited with the Mercantile Trust Co., or one hundred eighteen and fifty-six one-hundredths (118 56-100) shares, for the use and benefit of said Batchelor, Mr. Edison to retain the voting rights. Provision is made in this agreement (in the event of Mr. Batchelor's death, which took place a year or so ago) for determination of Mr. Batchelor's rights under the agreement, and the payment by the Works to his estate of the amount which his rights thereunder might be worth by means of the customary device of an arbitrator appointed by each of the parties and a third appointed by the two so chosen. The original agreement

Robert H. McCarter, Esq., -- Page 3 -- 10/11/'10.

of May 12, 1888, in the last paragraph thereof, provides that the stock deposited with the Trust Company shall not be entitled to dividends under twenty-five percent. (25%), and contains a provision as follows: "That in case the Company is dissolved or should go into liquidation, such trust stock (1,125 6-10 shares) shall not be entitled to participate in the property or assets of the Company." Dividends over 25% have never been paid and likely never will be.

4. On August 2, 1897, the Works mortgaged all its entire property, privileges, franchises, good will, real estate, and buildings, machinery, tools, etc., to the Fidelity Trust Company by deed of trust to secure an issue of bonds to the amount of three hundred thousand dollars (\$300,000.) Some of these bonds have been paid off and but two hundred eight (208) are now outstanding; of the 208 all but twenty (20) are held directly by Mr. Edison or his family. There has been no default in any payment relating to these bonds. I enclose copy of bond and mortgage, also taken from the Minute Book. The original I understand is with the Fidelity Trust Company.

5. The book valuation of the property of the Edison Phonograph Works on the 1st. of June, 1910, was within a few thousand dollars of one million two hundred thousand dollars (\$1,200,000.), or substantially twice the value of the authorized and issued capital stock. In this connection it should be remembered that the prosperity of the Works and its gain in assets has been largely due

Robert H. McCarter, Esq., -- Page 4 -- 10/11/'10.

to the fact that the other companies at Orange for which it has done the manufacturing have been obliged under the agreement of May 12, 1888, and other agreements based thereon, to pay ^{it} a twenty percent. (20%) clear profit on all its manufactures, thereby assuring it a certain profit whether earned by the other companies or not, and that, as a matter of fact, some of the other companies, and particularly the National Phonograph Company, has had to dip into the surplus of former years in order that it might pay this 20% profit to the Works. In view of these facts and of the fact that the directorate of the Works is controlled by Mr. Edison, it seems apparent that this 20% profit agreement could be set aside and new agreements, providing for less profit on the part of the Works, substituted, and that in such event the prosperity of the Works would probably decline.

6. The last shares of the stock outstanding from Mr. Edison's control, except those held by Mrs. Batchelor, were purchased by him within the past year or so at five points above par. This is the only guide we have to the market value of the stock.

7. Mr. Edison has offered to buy Mrs. Batchelor's stock but she has declined to sell, saying she "wanted to talk it over with her lawyer."

Upon these facts we wish to have your opinion on the following points:-

Robert H. McCarter, Esq., -- Page 5 -- 10/11/10.

(a) What is the most satisfactory and feasible method to include the Works in the proposed combination?

(b) What steps are open to be taken by Mrs. Batchelor or her attorneys in her behalf in the event of such inclusion of the Works in the consolidation, and the probable outcome thereof and

(c) What is the maximum amount which in your opinion she would be entitled to under whatever plan or plan of consolidation you may propose; and what the minimum amount which Mr. Edison would be justified in offering her?

LIST OF ENCLOSURES -- Copies of:-

Copied from Minute Book Certificate of Incorporation - Edison Phonograph Works,
April 30, 1888.

Edison - Works Agreement of May 12, 1888.

Confidential *H. Miller* Edison - Trust Co. Agreement of January 21, 1890.

Confidential *H. Miller* Edison - Trust Co. Agreement of April 8, 1890.

Confidential *H. Miller* Edison - Batchelor Agreement of April 8, 1890.

Confidential *H. Miller* Works - Fidelity Co. Trust Deed of August 2, 1897.

Very truly yours,

RHD/L

October 18, 1910.

Robert H. McCarter, Esq.,
Prudential Building,
Newark, N. J.

6

Dear Mr. McCarter:-

The exact distribution of the six thousand
shares of the Edison Phonograph Works is as follows:-

Directly held or controlled by Mr. Edison-----	4,565.96 Shares
Deposited with Mercantile Trust Co., Legal title in Mr. Edison--	1,185.6 "
Held by the Estate of Mr. Charles Batchelor-----	<u>248.44</u> "
TOTAL-----	<u>6,000</u> Shares

The 248.44 shares above referred to were
issued to Mr. Batchelor as follows:-

Certificate No. 1 -	5	Shares
" " 44 -	25	"
" " 60 -	25	"
" " 81 -	<u>193.44</u>	"

TOTAL----- 248.44 Shares

The 118.56 shares, 10% of the stock held by
the Mercantile Trust Co. in trust for Mr. Edison, have nothing
to do with the 248.44 shares owned by the Batchelor estate, and
are entirely separate and distinct therefrom. These 118.56
shares are part of the 38% of 52% which would not participate in
case of the Works being dissolved or going into liquidation;

Robert H. McCarter, Esq., -- Page 2 -- 10/18/'10.

while the 248.44 shares would participate in such event, and it is particularly to be noted that they would participate in excess of their face valuation, that is to say: their holder in the event of dissolution or liquidation would be entitled to a share in the proceeds represented by the fraction $\frac{248.44}{4814.40}$, the numerator of the fraction being the number of shares held by the Batchelor estate, and its denominator being all the stock which will participate in the assets of the Company in case of dissolution or liquidation, that is to say: 6,000 shares minus 1185.6 shares.

Very truly yours,

RHD/L

MCCARTER & ENGLISH
COUNSELLORS AT LAW
PRUDENTIAL BUILDING - 765 BROAD ST.
NEWARK, N. J.
ROBERT H. MCCARTER CONOVER ENGLISH
ARTHUR F. EGGER
TELEPHONE NO. 3088 HANNET

Newark, N. J., Oct. 21, 1910.

Herbert H. Dyke Esq.,
Edison Phonograph Works,
Orange, N. J.

Dear Mr. Dyke:-

Your two letters of Oct. 11th. and Oct. 18th. with the enclosures therein referred to, are before me, and I have given considerable time to a consideration of the questions you submit, with particular reference to the practical method of joining the Edison Phonograph Works in the proposed consolidation of the other Edison Companies, about which we have conferred so many times.

The embarrassment of course arises from the fact that there are outstanding 248.44 shares of stock in the Works held by the Batchelor Estate, upon whose co-operation you cannot count. The Works was incorporated on or about the 30th. of April, 1888, Mr. Batchelor being one of the subscribers to the Certificate of Incorporation. The period of corporate existence, by the certificate which he signed, and to which he became a party, was not to terminate until the 30th. of April, 1938. If the Works should desire to adopt the plan of selling all of its assets to the proposed consolidated company, without actually merging its corporate existence therewith, the Batchelor Estate would doubtless have the power to prevent such action, upon the ground that its stockholding interest had a right to claim that the corporate business described in the charter should be prosecuted, and that it was ultra vires the Board of Directors, or even of the stockholders, short of a unanimous consent, to denude the Works of all its property. The authorities in this State are so familiar

H. H. D. #2.

and so numerous upon this point, that I will not take time to cite them.

Another suggested course is that of merger, but unfortunately, the act authorizing a merger was not passed until 1893, or five years after the issuance of some, if not all, of the Batchelor stock, constituting the 248.44 shares, and I think it is quite as well settled that a recalcitrant stockholder can, by injunction, prevent a merger of his Company with another corporation under an act authorizing such merger, passed subsequent to the time of his becoming a stockholder. The recent Colgate case, 67 Atl. Rep. 657; 72 id. 126, in which I was of counsel, I think correctly assumes that this is the law. Hence, if the Batchelor Estate desired to be obstreperous, and prevent the Works from merging, as proposed, I am afraid it could interfere therewith. This, of course, is quite independent of the provision now found in the Merger Act for a condemnation of the stock of a stockholder unwilling to assent to a merger otherwise legally possible. Such condemnation, as you know, can only be initiated by the unwilling stockholder, and the Company is powerless to start them. They, however, are applicable when the merger is otherwise legally feasible, which, as we have seen, is not the case here, as against the Batchelor Estate.

It would therefore seem as if neither one of the above named methods of practical consolidation is surely available against the opposition of the Batchelor interest. How far such opposition would really be met, I of course cannot anticipate. You and your associates are much better advised upon that point than I. I am simply assuming the worst, and advising you upon naked legal principles.

The Works could still adopt the plan of dissolving and winding up its affairs and having a Receiver sell its property in dissolution to the consolidated company. How far such a course would be injudicious in view

H. H. D. #3.

of the large current business of the Works, I of course am ignorant of. It may be that it would be impracticable, but I do not think the Batchelor interest could legally prevent the dissolution, and while if this course were undertaken, great care would have to be exercised to prevent the claim that the dissolution is being conducted in the interest of Mr. Edison and the majority stock, who would also control the other company, and of course be the purchaser of the property, yet nevertheless I am of the view that it could not be prevented, and that the Batchelor interest would have to be contented with its quota of the purchase money derived from a sale on dissolution by the Receiver of the Works. The reason why I have suggested a Receiver, is because of the fact of the practical identity of the Boards of the several companies.

If dissolution were adopted, it would seem to me that under the agreements between Mr. Edison and the Mercantile Trust Co., none of the trusted stock would have to be considered as a participant, except the 118.56 shares which are the subject of the agreement between Mr. Edison and Mr. Batchelor, dated the 8th. of April, 1890. As I read that paper, I conclude that it intended to differentiate the 118.56 shares in which Mr. Batchelor was given an interest, from the balance of the 1185.6 shares deposited with the Mercantile Trust. The difference in the language between the two agreements between Mr. Edison and the Mercantile Trust Co., and Mr. Edison and Mr. Batchelor, with regard to the ultimate interest of Mr. Edison, satisfies me that even upon a dissolution, the Batchelor interest in the 118.56 shares would have to be reckoned with. The Batchelor agreement provides:

"It is, however, further agreed that if at any time hereafter the first party (Edison) or his legal representatives shall sell, transfer, assign, or in any way dispose of the said 1185.6 shares of stock of the Edison Phonograph Works, or any part thereof, or his rights therein, he or they will immediately thereafter either assign, transfer and pay

H. H. D. #4.

over to the said second party (Batchelor) or his legal representatives, all and every the benefits, profits and advantages accruing to him, the said party of the first part or his legal representatives, from the sale, transfer or disposition of the said 118.56 shares of said stock in which the said second party is interested as herein set forth * * * and that in the event of the liquidation of the said Edison Phonograph Works for any cause during the continuance of this agreement, and while the said stock is so held in trust, the said first party or his legal representatives will immediately assign, transfer and pay over unto the said party of the second part, that portion of the assets of the said Edison Phonograph Works, or the avails thereof, received by the said first party or his legal representatives, fairly and properly apportionable to the said 118.56 shares of the said stock in which the said second party or his legal representatives may be entitled, and interest hereunder."

The plain purport of this agreement is, I think, to give to Mr. Batchelor or his representatives, an ultimate beneficial interest in the 118.56 shares, and while, as between Mr. Edison and the Trust Company, the agreements are by mutual consent terminable, yet such termination would only result in the right of the Batchelor interest to demand an assignment of the 118.56 shares. It would therefore appear to me that in estimating the value of the Batchelor holding, the 118.56 shares, as well as the 248.44 shares, would have to be considered, and the fractional interest of the Batchelor claim would therefore, I think, be the sum of 248.44 and 118.56, or 367 of the purchase money acquired by the Receiver for the assets of the Works. ~~482.40~~ 4932.96 I would be glad to have you consider this last suggestion of mine with regard to the ultimate value of the Batchelor interest, in view of the phraseology of the Batchelor agreement. Perhaps I am wrong about it, although at the present writing this seems to me to be the correct view.

In view of the conclusion above reached with regard to the unfeasibility of a merger, I have not undertaken to suggest an answer to Point C, upon which you, in your letter of Oct. 11th, desired my opinion.

Very truly yours,

Robert L. Batchelor

Nov. 17, 1910.

Robert H. McCarter, Esq.,
Prudential Building,
Newark, N. J.

Dear Sir:-

RE: PROPOSED CONSOLIDATION OF EDISON COMPANIES.

There are three ways of looking at the proportion of the Batchelor Estate interests in the assets of the Edison Phonograph Works:-

(1) Upon the basis of the May, 1888, contract, which provides that the trustee stock should not participate in the case of the dissolution or going into liquidation of the Works, the effect of which agreement if not changed by the later Batchelor-Edison agreement would be to deprive both Mr. Edison's nine-tenths and the Batchelor one-tenth of such trustee stock of any share in such assets. On this basis the Batchelor interest would be $\frac{248.44}{4814.40}$, or 5.16% of the total assets.

(2) Upon the basis of the May, 1888, agreement, considering that both Mr. Edison's nine-tenths and the Batchelor one-tenth of the trustee stock should participate in the assets; on this basis the Batchelor proportion would be $\frac{387}{6000}$, or 6.11% of the total assets.

Robert H. McCarter, Esq., -- Page 2 -- 11/17/'10.

(3) Upon the basis suggested in your letter of October 21st., in which it is considered that the one-tenth of the trustee stock held by the Batchelor Estate should participate notwithstanding the agreement of May, 1888, to the effect that none of the trustee stock shall so participate; on this basis the Batchelor interest in the total assets would be not ~~38367~~ 4814.40, as you suggest, but ~~367~~ 4932.96 (since the 118.56 shares would have to be added to both the numerator and denominator of the fraction). Reduced to percentages, the Batchelor interest figured in this way would be 7.43%.

You will see from the above that it is decidedly to Mr. Edison's interests to effect a settlement, if a settlement can be effected at all with Mrs. Batchelor, upon the first or second of the schemes outlined above. instead of upon the basis of the third. It seems only fair that if the one-tenth of the trustee stock in which Mr. Edison gave Mr. Batchelor the beneficial interests is to participate in the assets upon dissolution, then Mr. Edison's nine-tenths should participate likewise, and such construction of the document seems to me to be consistent with its terms.

Will you please run over the copies sent you some time since and in view of the above suggestions give us your views on the subject.

It is Mr. Dyer's opinion that the second method of

Robert W. McCarter, Esq., -- Page 3 -- 11/17/'10.

figuring the percentage above is the correct one, and it seems to me, too, that if the Edison-Batchelor agreement has any effect upon the May, 1888, agreement -- and I cannot but feel that it has no effect on the earlier agreement at all -- it should make all the trustee stock participate in the assets, and not merely the one-tenth of the Batchelor Estate.

Very truly yours,

RWD/LEL

MCCARTER & ENGLISH
COUNSELLORS AT LAW
PRUDENTIAL BUILDING - 705 BROAD ST.
NEWARK, N. J.
ROBERT H. MCCARTER ———— CONVEYER ENGLISH
ARTHUR F. ENGLISH
TELEPHONE NO. 2085 MARKET

Newark, N. J., Nov. 19, 1910.

H. H. Dyke Esq.,
Edison Phonograph Works,
Orange, N. J.

6

Dear Mr. Dyke:-

Replying specifically to your letter of the 17th. in regard to the proposed consolidation of the Edison Companies, I beg to say that upon further reflection and examination I have somewhat modified my views touching the status of the 118.56 shares of stock held by the Bacheller Estate. There is no doubt that Mr. Edison and Mr. Bacheller, in their agreement of April 8th, 1890, undertook to bestow upon these 118.56 shares of stock some kind of an interest in the assets of the Works, in the event of liquidation, and had Mr. Edison, on the date of that agreement, been in a position effectually to have carried out his intention, the situation would have been different. It is plain, however, that the 118.56 shares, being parcel of the 1185.6 shares, ^{and} the subject of a special agreement between the Works and Mr. Edison, whereby they were expressly deprived of any participation whatever in the event of liquidation or dissolution, it seems to me that Mr. Edison was powerless to thereafter bestow upon the 118.56 shares any participating power without the consent of the other stockholders of the Works, of whom at that time there were, as you know, a considerable number. In other words, it seems to me that these other stockholders had a right to say that their stock at the time of the original agreement between the Works and Mr. Edison, had a right to expect that the 1185.6 shares would not share in the liquidated

H. H. D. #2.

assets, and that therefore they could object to the dilution of their interest by the bestowal upon the whole or any part of the 1185.6 shares of the right to share in liquidated assets. This being so, the mere fact that Mr. Edison has since acquired these outstanding shares, will make no difference. He bought the latter with the right impressed upon them to insist that there be no dilution of their value, and so the effort that he and Mr. Bacheller subsequently made to give to the 118.56 shares a participating feature, if such was their effort, was, in my judgment, futile, consequently it is my opinion that the first suggestion of your letter of the 17th. is correct, and contains the proper fractional and percentage basis of the Bacheller interest, in the event of dissolution.

Very truly yours,

Robert C. McLean

*Mr. Dyer -
Thank you much for
memo of 2500000
for H. H. D. & Edison -
R.C.M.*

5169

6

Nov. 22, 1910.

Mrs. Rosanna Batchelor,
33 West 25th Street,
New York, N. Y.

Dear Madam:-

I enclose herewith a copy of the original contract of May 12, 1888, so that you may see the rights of the Works as originally defined. As a matter of fact, Mr. Edison has quite considerably enlarged the operations of the Works by turning over to it other lines of business not contemplated in the original agreement.

The reason why Mr. Edison desires to obtain the stock of the Works which you own is that its possession would simplify the proposed consolidation of the Edison companies at Orange.

The value of the stock is in a large degree speculative in that it is dependent entirely upon the continued prosperity of the phonograph business. While we confidently believe that the phonograph business is a permanent one, it is nevertheless true that the amount of business done now is considerably less than in 1907.

The last sale of any stock of the Works was made by a syndicate represented by the Guaranty Trust Company, which made a very careful investigation into our affairs and accepted an offer

Mrs. Rosanna Batchelor -- Page 2 -- Nov. 22, 1910.

of 1.05. This was in the spring of 1910, and since that time the situation has not improved, and the stock is certainly not worth any more now than it was then.

Mr. Edison is not able to pay cash at this time for the stock, but he is willing to buy the stock held by you at the rate of 1.05 with the understanding that the stock and a general release will be put up in escrow with some trust company and payments made thereon at the rate of two thousand dollars (\$2,000.) per month, the stock and release to be turned over when the amount is fully paid.

If you care to accept this offer please let me know as soon as possible, because we have already gone ahead with the consolidation papers, leaving out the Works, and if the Works are to be included we should know as soon as possible.

Very truly yours,

HHD/LEL

RECEIVED

NOV 25 1916

FRANK L. Dyer.

33 WEST TWENTY-FIFTH STREET.

6

Mr. Frank L. Dyer,
Dear Sir,

In your letter
of November 22nd just
received, you make me
an offer on behalf of
Mr. Edison for my
Phonograph Wires Etc etc
and a general release.
Will you kindly explain

to me what you mean
by this last clause,
and send me an
outline of what you
would require in the
nature of a general
release.

Yours very truly,
Kathleen Kitchin.

November twenty fourth,
1910.

December 1, 1910.

Mrs. Rosanna Batchelor,
33 West 25th Street,
New York, N. Y.

Dear Madam:-

I am enclosing a form of release such as I had in mind in writing you on November 22nd.

I had not taken up the matter of the release with Mr. Edison at the time of writing you on the 22nd., but made the suggestion of a release merely as a matter of routine, and in accordance with the custom generally prevailing among lawyers.

I have now called the matter to Mr. Edison's attention and he states that it will not be necessary for you to give him a release. The enclosure is accordingly sent you for your information only, and there will be no occasion for you either to sign the enclosed paper or to place it with the stock certificates in the hands of the Trust Company as suggested in my former letter.

For the reasons stated in my letter of November 22nd. I hope to have an early reply to Mr. Edison's offer.

Very truly yours,

HHB/LEL

Enclosure.

RECEIVED.
DEC 6 1910
FRANK L. DYER.

33 WEST TWENTY-FIFTH STREET.

Mr. Frank L. Dyer,

Dear Sir,

In your negotiations with me concerning the purchase of my Phonograph stock, the question of the interest I have in the Mercantile Trust stock has not been raised.

I would not care to dispose of the stock I own outright without knowing what Mr. Edison would

offer to do about the 118 odd
shares in which, according
to a contract existing
between Mr. Edison and
my late husband, I believe
I have a claim.

If you will kindly
let me know I will
be glad to give the
matter further consideration.

Yours very truly,
Katharine Bateman

December 5th 1910.

Dec. 14, 1910.

Mrs. Rosanna Batchelor,
33 West 25th Street,
New York, N. Y.

Dear Madam:-

I have just returned from a western trip, and find your letter of December 5th. I am, of course, familiar with the contract relating to the 118.56 shares to which you refer. Mr. Edison tells me that the 1185.6 shares, of which this is one-tenth, never represented any ownership in the holdings or assets of the Works, but were issued for two purposes only, namely: to give him voting rights, and to assure to him a share in the dividends above twenty-five percent. if it should turn out that the Works would pay exceptional profits and declare dividends in excess of that amount. In the contract to which you refer, which reserved the voting rights to Mr. Edison, the only thing which passed to Mr. Batchelor was the right to share in any dividends which might be declared in excess of twenty-five percent. As a matter of fact, there never have been such dividends declared, and the Works has never made profits justifying any such dividends, and it is altogether unlikely that any such dividends will be paid hereafter, as the keen competition in the phonograph

Mrs. Rosanna Batchelor -- Page 2 -- 12/14/'10.

business of the present day keeps profits far below the percentage indicated. We were, therefore, of the opinion that under all the circumstances the interest conveyed in the 118.56 shares by this agreement is entirely valueless; but not wishing to rely on our own judgment, we have referred the matter to Mr. Robert H. McCarter, of Newark, N. J., formerly attorney-general of this State, and he has advised us that our views on the subject are correct.

I have copied below the provisions in the contract between Mr. Edison and the Works, providing for the issuance of this stock, so that you may see that it was never intended that the holding of this stock should represent any ownership in the property of the Works, but merely secured voting rights and the right to share in dividends in excess of the twenty-five percent;

"1. That said stock so delivered to the trustee shall not participate in any of the earnings or the party of the second part nor be entitled to share in any dividends. If, however, the earnings of the Company which it decides to declare as dividends in any one year amount to over twenty-five percent. (25%) on its entire stock exclusive of such stock so held in trust as aforesaid, then such trust stock shall be entitled to participate ratably with the other stock in such excess; and

2. That the party of the first part, his heirs, executors, administrators and assigns shall have the exclusive right to vote upon the stock so held in trust at all meetings of the Company, and a proxy shall be given him or them for such purpose; and

3. That in case the Company is dissolved or should go into liquidation such trust stock shall not be entitled to participate or share in the property or assets of the Company.

Mrs. Rosanna Batchelor -- Page 3 -- 12/14/'10.

However, aside from the foregoing, this matter is entirely apart from Mr. Edison's proposal to purchase your holding of 248.44 shares of the stock of the Works, and any interest which you may have in the 118.56 shares would remain in you, irrespective of your disposition of the shares which Mr. Edison has offered to purchase.

I shall be pleased to know your decision on Mr. Edison's offer at an early date; and if you have any suggestions to make regarding the one-tenth portion of the Trust Company stock referred to in Mr. Batchelor's agreement with Mr. Edison, I shall be glad to consider the same either in connection with the offer for the 248.44 shares or as a separate matter.

Very truly yours,

HRD/YEL

RECEIVED.

DEC 27 1910
FRANK L. DYER.

33 WEST TWENTY-FIFTH STREET.

Dye

Mr. Frank L. Dyer,

Dear Sir,

As I told you in
my letter of December 5th I
do not care to dispose of
my Phonograph Co. stock
until I understand
clearly what my rights
are in the stock held
by the Mercantile Trust
Co. I am now going to

ask you for a copy of
the two contracts held by
the Trust Co. and referred
to in the agreement which
my husband had with
Mr. Colison.

Perhaps then I may see
my way clear to coming
to a decision.

Very Truly Yours,
Francesca Butcher.

December 26th
1910.

Dec. 27, 1910.

Mrs. Rosanna Batchelor,
33 West 25th Street,
New York City.

Dear Madam:

Your favor of the 26th inst. has been received, and in accordance with your request I beg to hand you copies of the two contracts referred to. If there are any other papers you wish to have copies of, let me know and I will be glad to send them to you.

I hope you will be able to make up your mind soon about this matter because otherwise I will have to go ahead and bring about the consolidation leaving out the Phonograph Works, and this has to be done so that the plan may be in operation before the end of the fiscal year on February 28th next.

Yours very truly,

HHD/LEL

Enc-

**Legal Department Records
Phonograph - Correspondence**

Douglas Phonograph Company

This folder contains documents relating to the formation of the Douglas Phonograph Co., a New York corporation organized as a successor to Douglas & Co. The company was formed in November 1904 and dealt in Victor talking machines as well as Edison phonographs. It was controlled by the National Phonograph Co. The selected items cover the years 1904 and 1906. They consist of a letter from New York attorney Frank E. Bradley to Frank L. Dyer regarding the reorganization of Douglas & Co; minutes of the first meeting of the incorporators and subscribers of the Douglas Phonograph Co.; and the president's and treasurer's report for the year ending October 31, 1906.

Approximately 20 percent of the documents have been selected. The items not selected include correspondence, minutes, and memoranda pertaining to the operations of the company.

LAW OFFICES OF
FRANK E. BRADLEY.
608 DUN BUILDING.
295 BROADWAY.

TELEPHONE (8745) FRANKLIN.
(2745)
(2747)

NEW YORK. September 2nd, 1904.

Frank L. Dyer, Esq., Gen. Counsel,
Edison Laboratory,
Orange, N. J.

Dear Sir:-

Pursuant to your request of day before yesterday, I beg to submit herewith an outline of a plan which I suggested to Mr. Gilmore to meet the Douglas & Co. situation. As you know, at this time I can do no more than outline, for the reason that the facts upon which any plan of action is to be based are not yet to be had.

One of the main causes of trouble in the past in this matter has been the fact that the business, while it has practically been financed by the National Phonograph Company, still that company had no legal control over the business. It occurred to me that if a small New York corporation were formed, that difficulty might be best obviated. In substance, it would mean to do as follows: whatever cash the business has on hand could be sold to the new company for stock at par; the balance of the proposed issue of stock could be sold to Mrs. Douglas for the good will, trade name, etc. of Douglas & Co. Mrs. Douglas, being interested in the preservation of the company, I assume, would be willing to enter into a plan whereby the National Company would be in complete control of the corporation until its claims are paid. The new company would probably put the old accounts into the form of notes, maturing at regular intervals and in such amounts as shall be determined upon. Mrs. Douglas ought to endorse these notes also individually, because in so doing she would incur no liability other than the one which she now has-- that is to say, she is personally liable for all of those debts.

F.L.D.

- 2 -

9-2-04.

As to what understanding and in what way Mr. Loucks will figure in this reorganization, is a matter which the parties will determine among themselves. I made a suggestion the other day that in my opinion it was the best policy for our clients to have both Mrs. Douglas and Mr. Loucks jointly interested in having the company pay off its debts to our clients, thereby benefiting themselves in the building up of a business of their own.

As you see, this is an outline merely, but I believe that if the parties agree, based upon it, a feasible plan will be evolved and that the best interests of all concerned will be furthered.

Yours very truly,

Frank E. Bradley

FIRST MEETING OF INCORPORATORS AND SUBSCRIBERS
OF
DOUGLAS PHONOGRAPH COMPANY.

FIRST MEETING of the Incorporators and Subscribers
held at the office of the Corporation, at 290 Broadway in
the City of New York, State of New York, on the first
day of November, 1904, at two o'clock in the afternoon.

Call to
order.

Mr. Edward E. Franchot, one of the subscribers to the
Certificate of Incorporation and to the Capital Stock of
this corporation called the meeting to order, and stated
the object thereof.

Election
of
Chairman

On motion duly made and seconded and carried, Mrs.
Martha Virginia Douglas was nominated Chairman of the meet-
ing, and a vote being duly taken, was duly elected to take
such position.

Election
Se of
Secretary

On motion duly made, seconded and carried, Mr. Char-
les V. Henkel was nominated Secretary thereof, and a vote
having been taken, was duly elected to occupy such position

Each accepted his or her respective office and
discharged the duties thereof until the close of the meet-
ing.

Subscribers There were personally present the following subscrib-
personally ers to the Capital Stock:
present.

Martha Virginia Douglas	East Orange, N. J.	48 shares
Charles V. Henkel	290 Broadway, New York	1 "
Edward E. Franchot	290 Broadway, New York	1 "

Call of
Roll

On motion duly made, seconded and carried, the roll of the incorporators and subscribers was called by the Secretary, and each of the above named incorporators and subscribers present, representing the number of shares set opposite to his name respectively, answered present, showing that the total number of shares was present in person.

On motion duly made, seconded and carried, the Secretary was directed to spread the same at length upon the minutes.

At the close of the roll call the Chairman declared that 50 shares of the capital stock were represented and that the meeting was completely organized and competent to proceed to the transaction of business.

Presenta- The Secretary then presented and read a waiver of
tion of
Waiver of notice of time and place of holding the present meeting,
Notice signed by all the incorporators and subscribers to the capital stock of the company.

Upon motion duly made, seconded and carried, the same was ordered on file and the Secretary was requested to cause the same to be spread at length upon the minutes of the meeting.

Waiver of
Notice.

WAIVER OF NOTICE

of

MEETING OF INCORPORATORS AND SUBSCRIBERS

of

DOUGLAS PHONOGRAPH COMPANY.

We, the undersigned, being all the parties named in the Certificate of Incorporation of Douglas Phonograph Company and all the subscribers to the Capital Stock thereof,

Do hereby waive all notice whatsoever of the first meeting of the incorporators and subscribers to the Capital Stock of the said Company, and do consent that the first day of November, 1904, at (2) two o'clock in the afternoon, be and hereby is fixed as the time, and the office of the Company at No. 290 Broadway, in the City of New York, as the place, for holding the same, and that all such business may be transacted thereat as may lawfully come before the said meeting.

Dated the first day of November, 1904.

Charles V. Herkel

M. V. Douglas

Edward W. Franchot

Secretary's Report as to compliance with legal requirements as to filing, &c.

The Secretary then presented and read to the meeting a certified copy of the Certificate of Incorporation of the Company and reported that the same had been filed and recorded in the office of the Secretary of State of the State

of New York, on the 28th day of October, 1904, and that the organization tax of 1/20 of one per cent on the authorized capital stock of the Company had been paid to the State Treasurer, to wit: the sum of Twelve 50/100 Dollars and that a receipt therefor has been given by him on the 28th day of October, 1904, and that a duplicate original of the said Certificate of Incorporation together with the receipt from the State Treasurer had been filed and recorded in the Office of the Clerk of the County of New York, the County in which the principal office and place of business of the corporation is to be located and that all the fees for filing and recording such certificates had been duly paid before filing.

Report of payment of filing fees.

Upon motion duly made and seconded and carried, it was

RESOLVED, That said report be accepted as correct, and the Secretary be requested to cause such certificate and receipt to be spread at length upon the minutes of the meeting.

CERTIFICATE OF INCORPORATION
OF
DOUGLAS PHONOGRAPH COMPANY

WE, THE UNDERSIGNED, desiring to form a corporation under the laws of the State of New York, pursuant to the provisions of The Business Corporation Law, all being of full age, and all being citizens of the United States, and at least, one of us a resident of the State of New York, do hereby certify:

First: That the name of the proposed corporation is DOUGLAS PHONOGRAPH COMPANY.

Second: That the purposes for which said corporation is to be formed are :

I. To carry on any business which a business corporation can properly engage in under the laws of the State of New York, and particularly the business of buying, selling and dealing in Talking Machines of every description and all that relates thereto.

II. To purchase or otherwise acquire Letters Patent granted by any country in the world, or any interest therein, to hold, sell or develop the same or grant licenses thereunder.

Third. That the amount of the Capital Stock of the said corporation is Twenty five thousand dollars, (\$25000), all of which shall consist of Common Stock.

Fourth. That the number of shares of which said Capital Stock shall consist is Two hundred and fifty, each of which is One hundred dollars, and the amount of capital with which said corporation will begin business is Five thousand dollars (\$5000).

Fifth: That the principal business office is to be located in the City of New York, Borough of Manhattan, County of New York and State of New York.

Sixth. That the duration of said corporation is to be perpetual.

Seventh. That the number of Directors of the said corporation is three.

Eighth. That the names and post office addresses of the Directors for the first year are as follows:

<u>Names.</u>	<u>Post Office Addresses.</u>
Martha Virginia Douglas	East Orange, New Jersey.
Charles V. Henkel,	290 Broadway, New York City
Edward E. Franchot,	290 Broadway, New York City.

Ninth. That the names and post office addresses of the subscribers of the certificate and the number of shares of stock each agrees to take in said corporation are as follows:-

<u>Names</u>	<u>Post Office Addresses.</u>	<u>No. of Share</u>
Martha Virginia Douglas	East Orange, N. J.	48
Charles V. Henkel	290 Broadway, New York, N.Y.	1
Edward E. Franchot	290 Broadway, New York, N.Y.	1

Tenth. The Company shall have the power to purchase or otherwise acquire the stock, bonds, securities or other obligations of any other corporation, and while the owner thereof to

exercise all the rights and privileges of individual ownership, including the right to vote on such stock.

IN WITNESS WHEREOF, we have made, signed and acknowledged this certificate this 25th day of October, 1904.

Martha Virginia Douglas (SEAL)

Chas. V. Henkel (SEAL)

Edward E. Franchot (SEAL)

STATE OF NEW YORK :
COUNTY OF NEW YORK : ss.

On the 25th day of October, 1904, before me personally came Martha Virginia Douglas, Charles V. Henkel and Edward W. Franchot, to me known and known to me to be the individuals described in and who executed the foregoing certificate, and they severally acknowledged to me that they executed the same.

M. A. Howser,
Notary Public,
County of New York.

(SEAL)

\$12.50 TREASURER'S OFFICE -- STATE OF NEW YORK

Albany, Oct. 28, 1904.

RECEIVED from DOUGLAS PHONOGRAPH COMPANY-----

Twelve & 50/100-----Dollars,
in full of tax of one-twentieth of one per centum upon the Capital
Stock of \$25,000 of the above named Company for the privilege of re
organization, pursuant to chapter 908, Laws of 1896 as amended.
Willis E. Heinman, B. H. Davis,
Second Deputy Comptroller. Deputy Treasurer.

Report as to sub-
scrip-
tions.

Mr. Charles V. Henkel, one of the Directors on behalf of those named as Directors in the Certificate of Incorporation, then presented and read the subscription list to the Capital Stock of the corporation and reported that fifty shares of the said stock had been subscribed for and that the ten per cent cash payment had been made as required by law upon each share which was payable in money, and that the same had been deposited for the Company with the Directors and said subscriptions had, since the filing of the Certificate of Incorporation, been accepted.

Upon motion duly, made, seconded and carried, it was RESOLVED that said report be accepted as correct and that this Company accept such subscriptions and together with said subscription list be filed with the Secretary of the Company and that the Secretary be requested to spread the said subscription list upon the minutes, and to notify the said subscribers of the acceptance of their respective subscriptions.

Report of Payment of Amount with which business is to be commenced

Mr. Charles V. Henkel, on behalf of the Directors named in the Certificate of Incorporation, reported that the sum of Five Thousand Dollars named in the Certificate of Incorporation as the amount with which the corporation is authorized to begin business, had been paid into the hands of Mr. Charles V. Henkel, who reported that he held the said sum on behalf of the said Company, and was ready to pay the same to the Treasurer as soon as he should be selected.

Upon motion duly made, seconded and carried, it was
RESOLVED, that said report be accepted as correct and
filed with the Secretary of the Company.

Appointment of Committee to prepare By-laws. On motion duly made, seconded and carried, Messrs. Edward R. Franchot and Charles V. Henkel were appointed a Committee to prepare a set of by-laws for the regulation of the affairs of the Company, the management of its property, the transfer of its stock, and the calling of meetings of its shareholders and directors, and fixing what attendance and what amount of stock must be represented thereat to constitute a quorum, and such other matters as can properly be contained in such by-laws, and to report the same to the meeting at their earliest convenience.

Upon motion duly made, seconded and carried, a recess was taken until the Committee should be ready to report to the meeting.

Report of Chairman on By-Laws. The Chairman called the meeting to order and announced that the Committee was ready to render its report whereupon the Committee to whom had been entrusted the drawing up of by-laws presented its report with a proposed set of by-laws, which were taken up and read clause by clause and separately carefully considered and discussed at length by the members, and

Adoption of By-laws. Upon motion duly made, seconded and carried the following were adopted as and for the by-laws of the Company and the Committee discharged with thanks, and

Upon motion duly made, seconded and carried, the Secretary was instructed to cause the same to be spread at length upon the minutes.

BY - LAWS
OF
DOUGLAS PHONOGRAPH COMPANY

Article I.

MEETING OF STOCKHOLDERS

Sec. 1. Annual Meetings. The annual meeting of stock holders for the election of Directors for the ensuing year and for such other business as may properly come before the meeting, shall be held at the office of the Company in the City of New York, Borough of Manhattan, on the third Monday of November of each year at two o'clock in the afternoon of that day and should the said day fall upon a Sunday or upon a legal holiday, then upon the first day thereafter not a legal holiday. The Secretary shall serve personally or send through the Post Office, at least ten days before such meeting, a notice thereof addressed to each stockholder at his last known Post Office address, and publish notice thereof as required by law. At all meetings of stockholders, except where it is otherwise provided by law, it shall be necessary that stockholders, representing in person or by proxy a majority of the Capital Stock shall be present to constitute a quorum.

In case a quorum shall not be present at any meeting, a majority of those present may adjourn the meeting to such future date as those present may determine, and the Secretary shall thereupon mail or serve written notices of such adjourned meeting to each of the stockholders of record of the Company as hereinbefore provided.

Sec. 2. Special Meetings. Special meetings of stockholders, other than those regulated by statute may be called at any time by a majority of the Directors upon ten days' notice to each stockholder of record, such notice to contain a statement of the business to be transacted at such meeting and to be served personally or sent through the Post Office addressed to each such stockholder of record at his last known Post Office address.

The Board of Directors shall also in like manner call a special meeting of stockholders, whenever so requested in writing by stockholders representing not less than one-third of the capital stock of the Company.

No business other than that specified in the call for the meeting shall be transacted at any special meeting of the stockholders.

Sec. 3. Voting. At all meetings of the stockholders and at all elections of Directors, each stockholder, in person or by proxy, shall be entitled to cast one vote for each share of stock standing in his or her name on the transfer books of the Company at least ten days preceding the meeting. All proxies shall be in writing and shall be filed with the Secretary at or previous to the time of meeting.

Sec. 4. Order of Business. At all meetings of stockholders the following order of business shall be observed so far as consistent with the purposes of the meeting, viz:

1. Call of Roll.
2. Report of proper notice of meeting
3. Reading minutes of preceding meeting and action thereon.
4. Report of President
5. Report of Secretary
6. Report of Treasurer
7. Report of Committees (if any)
8. Election of Directors
9. Unfinished business
10. New Business.

ARTICLE II.

DIRECTORS

Sec. 1. The number of directors shall consist of three.

Sec. 2. At the annual meeting the three persons receiving a plurality of the votes cast at the election held thereat, shall be Directors for the ensuing year.

Sec. 3. The term of office of each of the Directors shall be one year and thereafter until a successor be elected.

Sec. 4. The Board of Directors shall have the entire management and control of the business of the corporation, and shall employ such agents and servants as they may deem

advisable, and fix the rates of compensation of all officers, agents and employees.

Sec. 5. Whenever any vacancies shall occur in the Board of Directors, by death, resignation, or otherwise, the same shall be filled without undue delay by the majority vote by ballot by the remaining members of the Board. The person so chosen shall hold the office until the next Annual Meeting, or until his successor is elected and qualified.

Sec. 6. The Board of Directors shall meet at the office of the Company on the third Monday of each month, or at such time and in such places as they may by resolution determine, and they may adopt such rules and regulations for the conduct of their meetings and the management of the Company as they may deem proper, not inconsistent with these by-laws and the laws of the State of New York.

Sec. 7. At any meeting of the Board of Directors, a majority of the whole number of Directors shall constitute a lawful quorum for the transaction of business; but in the event of a quorum not being present, a less number may adjourn the meeting to some future date as those present may determine.

At all meetings of the Board of Directors, each Director is to have one vote, irrespective of the number of shares of stock of this Company that he may hold.

At any meeting at which every member of the Board of Directors shall be present, though held without notice, any

business may be transacted which might have been transacted if the meeting had been duly called.

A special meeting of directors may be called by any one director upon one day's notice. Said notice may be sent either through the mail to the last known post-office address of the directors or by telegraph or telephone or given verbally.

Sec. 8. The directors need not be stockholders.

Sec. 9. The President and treasurer shall constitute an executive committee to conduct the affairs of the company between meetings of the Board of Directors.

Article III.

OFFICERS

Sec. 1. All officers and agents of the company shall be special agents, and their power shall be limited exclusively to the authority granted them by these By-Laws, or to the further authority granted them by the Board of Directors, in accordance with its powers, in pursuance of resolution theretofore adopted.

Sec. 2. The officers of the company shall be a President, a Treasurer and a Secretary, but the person holding the office of Treasurer may also hold that of Secretary. The President shall be a director of the Company.

Sec. 3. The officers of the Company shall be chosen annually by the Board of Directors immediately after the election of each new Board and shall hold office until

their successors are duly chosen and qualified.

Sec. 4. Any officer may be removed, either with or without cause, and his successor elected at any regular meeting of the Board provided not less than two Directors vote in favor of such removal.

Article IV.
PRESIDENT

The President shall sign all certificates of stock, preside at all meetings of stockholders and Board of Directors, and shall do, perform and render such acts and services as the Board of Directors shall prescribe and require.

Article V.
SECRETARY

The Secretary shall countersign all certificates of stock, be the custodian of the seal of the corporation, and affix the same to all certificates of stock, papers and instruments requiring such seal; he shall keep the minutes and records of this corporation, the books prescribed by the statutes of this State, and such other books as the directors may require to be kept by him. He shall attend all meetings of directors and stockholders and render such other services as the directors may impose upon him.

Article VI.
TREASURER

The Treasurer shall perform such duties as the

Directors may impose upon him. He shall report the state of the finances of the corporation at each monthly meeting of the Directors, and at each annual meeting of the stockholders. He shall hold his office at the pleasure of the Directors, and may be removed whenever they determine upon such removal. He shall, if required by the Board of Directors, give to the Company such security for the faithful discharge of his duties as the Board of Directors may direct.

Article VII.

Should any vacancy occur in any office by death, resignation or otherwise, the same shall be filled without undue delay by the Board of Directors, at a special or regular meeting.

Article VIII.

INSPECTORS OF ELECTION.

Two Inspectors of Election shall be elected at each annual meeting of stockholders to serve for one year, and in the case of the refusal or inability of either or all of them to act, or his or their absence at the time of election, the meeting may appoint another or others to act in his or their place. But the Inspectors of the first Election of Directors and of all previous meetings of the stockholders shall be appointed by the Board of Directors named in the certificate of incorporation. No Director shall be eligible to election as Inspector. Every Inspector

shall, before entering upon the discharge of his duties, be sworn to faithfully execute the duties of Inspector at such meeting with strict impartiality and according to the best of his ability, and such oath shall be subscribed by him and immediately filed in the office of the Clerk of the County in which such election or meeting shall be held with a certificate of the result of the vote taken thereat, as provided by Section 28 of the Stock Corporation Law. An Inspector need not be a stockholder.

Article IX.

AUDIT COMMITTEE

The Board of Directors shall appoint annually one of its members as an Audit Committee whose duties shall be to audit the accounts of the Treasurer previous to the annual meeting and at such times as the Board of Directors may authorize.

Article X.

THE SEAL

The seal of the Corporation shall be as follows:-

Article XI.

CERTIFICATES OF STOCK

Sec. 1. The certificates of stock shall be numbered and registered in the order in which they are issued. They shall be bound in a book and shall be issued in consecutive order therefrom and in the margin thereof shall be entered the name of the person owning the shares therein represented, with the number of shares and the date thereof.

Such certificates shall exhibit the holder's name and the number of shares. They shall be signed by the President and countersigned by the Treasurer and sealed with the seal of the Company.

Sec. 2. The stock of the corporation shall be assignable and transferrable on the books of the Company only by the person in whose name it appears on said books or by his legal representatives. In case of transfer by attorney the power of attorney duly executed and acknowledged shall be deposited with the Secretary. In all cases of transfer the former certificate must be surrendered up and cancelled before a new certificate is issued, and such cancelled certificate pasted in the certificate book to its proper stub.

No transfer shall be made upon the books of the Company within ten days preceding the annual meeting of shareholders.

Sec. 3. If the holder of any stock shall lose the certificate thereof, he shall immediately notify the Compa-

ny of the facts and the Board of Directors may then cause a new certificate to be issued to him subject to the deposit of a bond in such form and with such sureties as the Board may require.

Article XII.

BILLS, NOTES, etc.

All bills payable, notes, checks or other negotiable instruments of the Company shall be made in the name of the Company and shall be signed by the Treasurer and countersigned by the President. *or Secretary*

No officer or agent of the Company, either singly or jointly with others, shall have power to make any bill payable, note or check or other negotiable instrument or endorse the same in the name of the Company, or contract or cause to be contracted any debt or liability in the name or on behalf of the Company, except as specially authorized by the Board of Directors.

Article XIII.

AMENDMENTS/

These by-laws may be altered, amended or added to by a majority vote of the directors at any meeting or by a majority vote of the stockholders at an annual meeting.

Any by-laws adopted by the Board of Directors regulating the election of directors or officers shall not be valid unless published for at least once a week for two successive weeks in a newspaper in the county where the election is to be held, and at least thirty days before

such election.

On motion duly made, seconded and carried, it was
RESOLVED: that the Company proceed to carry on the
business for which it was incorporated.

Mr. Henkel then offered the following preamble and
resolution which, after being discussed at length and fully
considered, was duly seconded and unanimously carried.

WHEREAS, Martha Virginia Douglas has been carrying
on for a number of years last a business in the City of New
York in the name of Douglas & Co., and

WHEREAS, on the 25th day of October, 1904, she
entered into an agreement (hereafter referred to as "THE
AGREEMENT") with the National Phonograph Company as fol-
lows:

MEMORANDUM OF AGREEMENT entered into this 25th day
of October, 1904, by and between MARTHA VIRGINIA DOUGLAS
of East Orange, New Jersey, party of the first part, and
NATIONAL PHONOGRAPH COMPANY, a New Jersey corporation,
party of the second part.

WHEREAS, the party of the first part has for a number
of years been carrying on a business in the City of New
York, State of New York, under the name of Douglas & Co.,
and

WHEREAS, as a result of carrying on the said business
she has become indebted in a large sum to the said National

Phonograph Company, and

WHEREAS, the party of the first part is desirous of securing further time for the payment of the said indebtedness, and for that purpose it being deemed advisable to re-organize the said business of Douglas & Co., and

WHEREAS, the National Phonograph Company is only willing to extend time for the payment of the said indebtedness upon the conditions hereinafter stated,

NOW THEREFORE, upon the consideration of One Dollar in hand paid from each party to the other, the receipt of which from the other is by each party acknowledged, and upon other good and valuable considerations moving from one party to the other, it is hereby agreed as follows:

The party of the first part agrees to form or cause to be organized forthwith a corporation under the laws of the State of New York, to be styled "Douglas Phonograph Company" or some other appropriate name; the capital stock to be Twenty-five thousand dollars and divided into shares of one hundred dollars each par value.

The party of the first part agrees to subscribe, or cause to be subscribed for, fifty shares of the said stock, the same to be paid for in cash at par, at the commencement of business, said \$5000 not in any way to come out of the present assets of Douglas & Co.--which are not to be diminished--but to be entirely new and additional capital for the running of the business.

The party of the first part also agrees to sell at

the same time all of the assets of every nature whatsoever of Douglas & Co., including the good will, trade mark, trade names, patent rights and license rights under the same, leases and interests in real estate, choses in action, accounts and bills receivable, cash on hand, etc., etc. to the said proposed new corporation, for the remaining twenty thousand dollars worth of stock; the said new corporation to assume all the liabilities of Douglas & Co.

The party of the first part agrees to cause the proposed new company, as soon as it is organized, to execute and deliver to the National Phonograph Company its promissory notes in the aggregate sum of her total indebtedness to the National Phonograph Company as of the date November 1st, 1904; each note to bear interest at six per cent per annum, and in such amounts and payable on such dates as the National Phonograph Company shall designate, the last of said notes, however, to be due and payable at most, three years from the date hereof; each of said notes also to be endorsed by the party of the first part.

The party of the first part will endorse in blank and deliver all of her shares or stock in the new company to the National Phonograph Company, it being the intent and purpose that the said National Phonograph Company shall hold the said shares or stock as security for the said notes until all of the same have been duly paid; it being understood that the said National Phonograph Company, if it so elects, shall have the same transferred to its own name

on the books of the Company or in the name of whosoever it may designate, and in all respects have the right to the voting power thereon. Should there be any default in the payment of any of the said notes, then the said stock may be sold at private sale without notice.

When all of the said notes have been duly paid, as aforesaid, the National Phonograph Company shall then forth with re-assign or cause to be re-assigned, the said shares of stock to the said party of the first part.

No dividends shall be declared or paid by the proposed new company until all of the said notes due the National Phonograph Company, as aforesaid, have been duly paid.

The said proposed new company will pay the party of the first part Fifty Dollars a week in lieu of all services rendered, so long as the said National Phonograph Company's notes are duly met.

The party of the first part agrees that she will not part with her title or interest in and to any of her shares or stock in the said company so long as any of the said notes due the National Phonograph Company, as aforesaid, remain unpaid.

Should there be any default in the payment of any of the said notes, then the National Phonograph Company may, if it so elects, declare all or any of the remaining unpaid notes forthwith due and payable.

It is the understanding of this agreement that the National Phonograph Company in no way assumes any liability

for any of the acts or omissions of the proposed new company.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

Martha Virginia Douglas (SHE),

NATIONAL PHONOGRAPH COMPANY,

By W. E. Gilmore,
President.
WITNESS:
William Pelzer.

WHEREAS, the said Martha Virginia Douglas has ordered to sell this company the assets of every nature whatsoever of Douglas & Co., as aforesaid, for \$20,000 of the full paid and non-assessible capital stock of this company, provided this company agrees to assume the conditions and obligations imposed upon it by the said "AGREEMENT" and

WHEREAS, it was the intention of the incorporators of this company, among other things, to purchase and take over and carry on the said business of Douglas & Co., as stated in the said agreement, and

WHEREAS, it appears, after due consideration and investigation that it is necessary and advantageous and for the best interests of this company that it acquire, purchase, take over and carry on the said business of Douglas & Co., as aforesaid, and that the consideration mentioned is fair value of the business and assets proposed

to be sold and transferred to this company,

NOW THEREFORE, BE IT RESOLVED that this company do purchase the business, property and rights mentioned and set forth in the aforesaid "AGREEMENT" for the price therein mentioned, and to that end to accept in all its terms and conditions the aforesaid proposition and offer of Martha Virginia Douglas, and that the aforesaid proposition together with a copy of this resolution be referred to the Board of Directors, and we hereby authorize and instruct our said Board of Directors to perfect the purchase and acquisition of said business of Douglas & Co., as aforesaid, and cause to be issued therefor in the proper form, pursuant to the laws of the State of New York, \$20,000 stock of this company, par value, full paid and non-assessable, providing that the judgment of the Board of Directors of this company concur in our opinion of the value of the property to be purchased.

Approval of Minutes. On motion duly made, seconded and carried, the foregoing minutes were then and there read and approved as and for the minutes of this meeting.

On motion duly made, seconded and carried,

THE MEETING ADJOURNED.

Authentication
of Minutes

I, Martha Virginia Douglas, the Chairman of the foregoing meeting, and I, Chas. V. Henkel, the Secretary thereof do hereby certify that the foregoing is a true, full and accurate statement and record of all the acts and things done thereat.

Dated the first day of November, 1904.

Martha Virginia Douglas - Chairman

Chas. V. Henkel, - Secretary.

AUTHENTICATION OF CERTIFICATE OF INCORPORATION
OF
DOUGLAS PHONOGRAPH COMPANY

Authentifi- This Is To Certify that on the 25th day of October,
cation of
Certifi- A. D., 1904, the persons hereinbefore named as subscribers
cate of In- to the Certificate of Incorporation desiring to become a
corpora- tion.
tion.

body corporate in accordance with the laws of the State of
New York, under the name and style of

THE DOUGLAS PHONOGRAPH COMPANY

with all the corporate rights, powers and privileges enjoyed under or by such laws did make, subscribe and acknowledge in due form the Certificate of Incorporation heretofore recorded on pages 17 to 21 of this book, which Certificate of Incorporation with the Certificate of acknowledgment thereunto attached was duly filed and recorded in the office of the Secretary of State, of the State of New York, on the 28th day of October, 1904, and a duplicate original of the same, in the office of the Clerk of the County of New York, on the 29th day of October, 1904.

IN WITNESS WHEREOF, the original subscribers to the said Certificate of Incorporation for the purpose of authentication of this record have hereunto subscribed their names and caused the corporate seal to be hereto affixed this first day of November, 1904.

(S E A L)

Martha Virginia Douglas
Edward E. Franchot
Chas. V. Henkel

MINUTES OF FIRST MEETING OF BOARD OF DIRECTORS OF
DOUGLAS PHONOGRAPH COMPANY

MINUTES of the First Meeting of the Board of Directors held at the office of the Company, 290 Broadway, in the City of New York, Borough of Manhattan and State of New York, on the first day of November 1904, at three o'clock in the afternoon.

Present: Mrs. Martha Virginia Douglas

Mr. Charles V. Henkel

Mr. Edward E. Franchot

being all of the directors named in the Certificate of Incorporation of the Douglas Phonograph Company.

Upon motion duly made, seconded and carried, Mr. Edward E. Franchot was nominated and elected Temporary Chairman.

Mr. Franchot thereupon accepted the position of Temporary Chairman and acted as such until relieved by the President.

Upon motion duly made, seconded and carried, Mr. Charles V. Henkel was nominated and elected Temporary Secretary.

Mr. Henkel thereupon accepted the position of Temporary Secretary and acted as such until relieved by the Permanent Secretary.

The Chairman then requested the Secretary to read the list of directors for the first year as set forth in the

Certificate of Incorporation and the following was the list

Mrs. Martha Virginia Douglas

Mr. Charles V. Henkel

Mr. Edward E. Franchot

The Secretary then presented and read to the meeting a waiver of notice of meeting subscribed by all the directors mentioned in the Certificate of Incorporation.

Upon motion duly made, seconded and carried, it was

RESOLVED, That the same be ordered on file, and the Secretary be requested to cause the same to be spread at length upon the minutes.

WAIVER OF NOTICE OF FIRST MEETING OF DIRECTORS.

WE, THE UNDERSIGNED, being all the Directors of the Douglas Phonograph Company, Do hereby waive all notice whatsoever of the first meeting of the Board of Directors of the said Company and do consent that the first day of November, 1904, at two o'clock in the afternoon, be and hereby is fixed as the time and the office of the Company, at 290 Broadway, in the City of New York, Borough of Manhattan, State of New York, as the place for holding the same and that all such business be transacted thereat as may lawfully come before said meeting.

Dated, the first day of November, 1904.

Charles V. Henkel

H. V. Douglas

Edward E. Franchot.

The Secretary then called the roll and all the directors of the Company were found to be present.

The Chairman thereupon stated to the meeting that there was a quorum present thereat as required by the by-laws.

On motion duly made, seconded and carried, it was RESOLVED, that the Board then proceed to the business of the meeting.

The Secretary then presented and read to the meeting the minutes of the first meeting of the Incorporators and Stockholders held on the first day of November 1904 at two o'clock in the afternoon, at the office of the Company.

Upon motion duly made, seconded and carried, the same were in all respects ratified, approved and confirmed.

The Secretary then presented and read to the meeting the by-laws adopted at the said meeting of the shareholders

The same were taken up clause by clause, discussed, and

Upon motion duly made, seconded and carried the same were in all respects ratified, confirmed and approved as and for the by-laws of the Company.

Upon motion duly made, seconded and carried, it was RESOLVED, that the meeting proceed to the election of the officers for the ensuing year.

The Chairman then stated that in accordance with the by-laws a President, Secretary and Treasurer of the Company were to be elected, and that nominations for President were

in order.

Mr. Henkel nominated for President Mrs. Martha Virginia Douglas, which nomination was seconded by Mr. Franchot.

Mrs. Douglas then retired from the room and took no part in the business of the meeting until her return as noted in these minutes.

On motion duly made, seconded and carried, the nominations were declared closed, and there being no other nominees it was moved, seconded and carried, that the Secretary of the meeting be requested to cast one ballot for Mrs. Douglas, which he did. The Chairman thereupon declared Mrs. Douglas unanimously elected President of the Company for the ensuing year.

Mrs. Douglas then returned to the room, was notified of the action of the Board, and she thereupon accepted the office of President and entered immediately upon the discharge of her official duties.

Mr. Franchot thereupon resigned the chair which Mrs. Douglas who presided for the remainder of the meeting took.

The Chair then stated that nominations for Secretary were next in order.

Mr. Franchot nominated Mr. Charles V. Henkel for Secretary which was seconded by Mrs. Douglas.

On motion duly made, seconded and carried, the nominations were declared closed, and there being no other nominees it was moved, seconded and carried that the Secre-

tary of the meeting be requested to cast one ballot for Mr. Charles V. Henkel, which he did.

The Chairman then declared Mr. Charles V. Henkel unanimously elected Secretary of the Company for the ensuing year.

Mr. Henkel thereupon accepted the position of Secretary and entered immediately upon the discharge of his official duties.

The Chair then stated that nominations for Treasurer were next in order.

Mr. Franchot nominated Mr. Charles V. Henkel for Treasurer, which was seconded by Mrs. Douglas.

On motion duly made, seconded and carried, the nominations were declared closed, and there being no other nominees it was moved, seconded and carried, that the Secretary be requested to cast one ballot for Mr. Charles V. Henkel, which he did.

The Chairman thereupon declared Mr. Charles V. Henkel unanimously elected Treasurer of the Company for the ensuing year.

Mr. Henkel thereupon accepted the position of Treasurer and entered immediately upon the discharge of his official duties.

On motion duly made, seconded and carried, the following resolution was adopted:

RESOLVED, That the Treasurer be and is hereby directed to execute and deliver to this corporation within thirty

days from the date of this meeting a bond in such sum and with such surety or sureties to be approved by this Board conditioned that he will faithfully account for all moneys belonging to the Company that may come into his hands as such Treasurer, and that he will faithfully perform the duties of his office as required by the Board of Directors and the by-laws of this corporation.

On motion duly made, seconded and carried, it was

RESOLVED, That the Treasurer be authorized, empowered and directed to open an account in the name of the Company with the Irving National Bank, City of New York, in the County of New York, New York, to deposit therein all funds and moneys belonging to the Company and to withdraw the same or any part thereof, by means of checks signed by him and countersigned by the President.

Upon motion duly made, seconded and carried, it was

RESOLVED, That the third Monday of each month be fixed as the day upon which the regular monthly meeting of the Board of Directors of this Company would be held during the ensuing year, at two o'clock P. M.

The Treasurer acknowledged the receipt of Five thousand dollars (\$5000), the same being in payment of the subscriptions as set forth in the Certificate of Incorporation.

Upon motion duly made, seconded and carried, it was

RESOLVED, that the Company by its President and Treasurer issue certificates of stock in the name of the Com-

pany to the subscribers designated in the Certificate of Incorporation.

The Board next took up the matter of the offer of Mrs. Martha Virginia Douglas to sell to this company the business assets, etc. of Douglas & Co., and the matter having been taken up and discussed at length, upon motion duly made, and seconded the following preamble and resolution was unanimously adopted:

WHEREAS, a resolution was duly passed at the meeting of the stockholders of this company held on the 1st day of November 1904, accepting all the terms and conditions of a certain proposition and offer made by Mrs. Martha Virginia Douglas for the sale and transfer of the business of Douglas & Co., upon the terms and conditions therein set forth and by which resolution the directors were authorized and instructed to accept the aforesaid offer and to purchase and acquire the aforesaid property and to pay for the said property the fair value of the property so transferred, as aforesaid, by the aforesaid proposition and offer, in the full paid stock of this company, providing in the judgment of the Board of Directors, the said price of \$20,000 was a fair valuation thereof, to which proposition and offer and resolution of the stockholders reference is hereby made, and the same are to be considered as if they were set forth at length on these minutes; and

WHEREAS, in the judgment of this Board of Directors after careful examination and fair appraisalment, this Board

is unanimously convinced that the said property is necessary and advantageous for the business of this company, and that the fair value thereof is the amount at par of the stock proposed to be issued in payment thereof.

NOW THEREFORE, BE IT RESOLVED, that in accordance with the provisions of the said resolution of the stockholders and in accordance with the judgment of this Board of Directors, this Company do accept the aforesaid proposition and offer of Martha Virginia Douglas and do purchase of her all the assets of every nature whatsoever of Douglas & Co., including the good will, trade-marks, trade names, patent rights, license rights under the same, leases and interests in real estate, choses in action, accounts and bills receivable, cash on hand, etc. for the sum of Twenty thousand Dollars (\$20,000) to be paid for by the issuance of full paid capital stock of this company at par value of \$20,000, and the President and Treasurer of this Company are hereby authorized, empowered and directed, upon the delivery of said property and the execution of the proper legal instruments necessary to convey and transfer said property, to issue and deliver in accordance with this resolution, the full-paid stock of this Company to the amount of Twenty thousand dollars (\$20,000), being 200 shares of the par value of \$100. each in payment thereof.

The Treasurer reported receipt by him from Mrs. Douglas of a bill of sale covering the property mentioned

in the foregoing resolution.

Upon motion duly made, seconded and carried, it was
unanimously

VOTED that the said report be accepted.

Upon motion duly made, seconded and carried, it was
RESOLVED, that the Certificate of the Capital Stock
of the Company be in the following form:

Certificate No. ----	INCORPORATED UNDER THE LAWS OF THE STATE OF
For-----Shares	NEW YORK
Issued for-----	CAPITAL STOCK \$25,000
Dated-----190--	Number Shares
Issued to-----	DOUGLAS PHONOGRAPH COMPANY
of-----	THIS IS TO CERTIFY that-----is the
Received the above	owner of -----shares of the Capital
Certificate-----	Stock of
-----190--	DOUGLAS PHONOGRAPH COMPANY
Certificate No.----	transferrable only on the books of the Com-
Cancelled-----190--	pany by the holder hereof in person or by
Certificate No.---is	duly authorized Attorney upon surrender of
ued in its place---	this Certificate properly endorsed.
-----190--	

SHARES - \$100 - EACH
FULL PAID AND NON-ASSESSABLE

IN WITNESS WHEREOF this Certificate has been prepared by the Directors and the said corporation has caused the same to be signed by its duly authorized officers and to be sealed with the seal of the corporation this-----day of-----A. D., 190-----

Treasurer.

President.

Upon motion duly made, seconded and carried, it was
RESOLVED, that said certificates be endorsed as
follows:-

For value Received---hereby sell, assign and transfer unto

the Shares of the Capital Stock represented by the
within Certificate, and do hereby irrevocable constitute
and appoint-----Attorney
to transfer the said stock on the Books of the within
named Company, with full power of substitution in
the premises.

DATED-----190---

In Presence of

NOTICE: The signature to this assignment must cor-
respond with the name as written upon the face of the cer-
tificate, in every particular, without alteration or en-
largement or any change whatever.

Upon motion duly made , seconded and carried, the meeting adjourned.

THIS IS TO CERTIFY that I Edward W. Franchot and I Martha Virginia Douglas, the temporary and permanent Chairmen respectively at the above meeting, and I, Charles V. Henkel the temporary and permanent Secretary respectively thereat, have read the foregoing minutes of the said meeting and the same are in all respects a full, true and accurate record of the proceedings thereat.

Dated, the first day of November, 1904.

Temporary Chairman
Edw. W. Franchot

Permanent Chairman
Martha Virginia Douglas

Temporary and Permanent Chairman
Charles V. Henkel

KNOW ALL MEN BY THESE PRESENTS, that in consid ration of Twenty thousand dollars (\$20,000) of full paid and non-assessable stock, par value, of the Douglas Phonograph Company, the receipt of which is hereby acknowledged, I do hereby grant, sell, transfer and deliver unto said Douglas Phonograph Company, its successors and assigns, the following goods and chattels: All the assets of every nature whatsoever of Douglas & Co., including the good will, trade marks, trade names, patent rights and license rights under the same, leases and interests in real estate, choses in action, accounts and bills receivable, cash on hand, etc. the items of which being more specifically set forth in the exhibits hereto attached.

TO HAVE AND TO HOLD all and singular the said goods and chattels forever. And the said grantor hereby covenants with said grantee that she is the lawful owner of said goods and chattels; that they are free from all incumbrances except as stated; that she will warrant and defend the same against the lawful claims and demands of all persons whomsoever.

IN WITNESS WHEREOF, the said grantor has hereunto set her hand this 1st day of November, 1904.

Martha Virginia Douglas (SEAL)

WITNESS:

F. E. Bridley.

DOUGLAS PHONOGRAPH COMPANY.
PRESIDENT'S REPORT
for the year ending October 31st, 1906.

The general business for the year while showing an increase of about \$42000.00 over the previous year, nevertheless it is not what might have been expected.

Several reasons may be assigned for these conditions.

First:

Since July 1st, 1906 the Victor Talking Machine Company have refused to supply us with goods for the reason that our Company have refused to sign the new contract submitted by the Victor Talking Machine Company. The failure to receive Victor goods very materially decreased our sales, not alone did we lose the sale of Victor goods, but in addition, sales of Edison and other goods, for reasons which are quite obvious. Every effort has been made to purchase Victor goods but not with any degree of success, and such goods as we have been able to purchase were at dealers prices, causing a resulting loss in profits.

Second:

Competition has become very keen and while our Company has become more conservative with reference to credit, our competitors have become more liberal, with the result of loss in business to us.

In addition business has not been as active as it might be, and general trade reports verify this statement.

Profit for the year.

In proportion to the amount of business done, we have not made as good a showing for the year 1906 as compared with the year 1905.

No comparison can be made at this time for the reason that certain deductions may be made from the figures submitted by our Treasurer. Another factor to be considered is the loss sustained by the reduction in price in Victor goods, December 1st, 1905, reducing the value of our assets and in addition from December 1st, 1905 to March 1st, 1906, Victor 7 - 10 - 12 records were sold at cost.

Extension of business.

The net earnings of the Newark Branch do not perhaps show the actual profit to the Company, from this source.

Considerable business is no doubt diverted to the New York house, which we might not receive if the Newark Branch did not exist.

Furthermore all Victor goods have been charged to Newark Branch at 40/10% and other supplies at an advance of 5% over our own cost. In addition to which Disc Records other than Victor were sacrificed owing to the cut in the price of Victor goods.

It is imperative to increase our Retail and Installment business and perhaps establish additional stores for the purpose.

Victor Suit.

We have instituted suit against the Victor Company for \$100000 damages and the same is being prosecuted as rapidly as possible.

Increase of Capital.

The Capital Stock has been increased to \$150000 - \$75000 preferred and \$75000 common, as authorized by the Stockholders.

General.

The future of the Company is very encouraging and with the additional capital a much larger and more profitable business should result.

Continued
End

DUGLASS PHOTODUPLICATION COMPANY.

Treasurer's report for year ending October 31st, on the accounts as they appear on that date.

Balance Sheet - Schedule A.

Herewith shows the Assets & Liabilities as they appear in the Private Ledger, subject to such depreciation or reduction as the Board of Directors may decide upon.

ASSETS.Accounts Receivable:

Show a total outstanding amounting to \$26,590.66 practically all good and collectable, all doubtful accounts having been written off to either Bad Debt Accounts or Suspended Accounts. No detailed Schedule is submitted as the data is all contained in the Trial Balance Book.

Bills Receivable:

Represents notes given by customers and not discounted at Bank, amounting to 282.62
These notes are shown in detail in Schedule A 1, together with a list of notes discounted, which represents a contingent Liability of \$7576.38.

Cash Account

Shows a balance in hand of 14,243.66 as follows:
On Deposit Germania Bank \$9688.07
 Fidelity Trust Co. 1869.97
 Washington Trust Co. 2000.00
 \$13548.04
Petty Cash in Hand 695.61

A summary of the Cash Account shown in detail in Schedule A 2.

Amount forward

\$41,116.73

ASSETS CONTINUED

Amount forward

\$41,116.73

Of the amount in hand of Traveling Salesmen, \$10.61, is due by F. C. McLean, no longer in our employ and should be written off to Profit & Loss.

Inventory - Schedule

This Schedule gives a comparative summary of this account --

\$66,015.76

	Nov. 1st, 1905.	Increase	Oct. 31, 1906.
New York	\$23,051.17	25,679.17	58,730.34
Newark	<u>8,620.40</u>	<u>1,334.98</u>	<u>7,285.42</u>
Total	<u>\$31,671.57</u>	<u>24,344.19</u>	<u>\$56,015.76</u>

* The total for November 1st, 1905, represents 5% deducted by order of the Board of Directors.

The Inventory figures are very conservative and represent actual values - all old or questionable goods being entirely eliminated. In addition the supply of Office Stationery & general advertising matter has not been considered.

The above Assets represent available or quick Assets and amount to a total of

\$107,130.49Furniture & Fixtures\$7,467.91

Represents both New York & Newark - A summary of which, is as follows:

	Nov. 1st, 1905.	Added for Year	Oct. 31, 1906.
New York	4,916.48	1,606.91	6,723.39
Newark	<u>840.18</u>	<u>104.34</u>	<u>744.52</u>
Total	<u>\$5,556.66</u>	<u>\$1,911.25</u>	<u>\$ 7,467.91</u>

*The total for November 1st is less 5% depreciation from actual figures and the Oct. 31st, balance is subject to the action of the Board of Directors in this respect.

Good Will:

This represents the amount at which the Company took over the account at the time of Incorporation.

20,000.00

Total Forward.

\$27,467.91

ASSETS CONTINUED.

	Account Forward	\$27,467.91
<u>M. V. Douglas "Special"</u>		2,350.00

This represents the amount paid M.V.D. to date on account of an arrangement to pay her \$10,000 at \$50 per week. Some plan should be suggested to properly treat these payments. Either add the name to Good Will or consider the account as an Expense.

Suspended Accounts

Represent Doubtful Accounts Receivable, transferred for convenience Schedule A 3, given these accounts in detail, with remarks as to possibility of collection etc.

2,281.88

The above represent Capital Assets and amount to a total of

\$32,039.79

LIABILITIESAccounts Payable:

These accounts are detailed in the Trial Balance Book. A short summary is as follows:

Due	National Phonograph Co.	\$58,987.94	
"	Sundry Creditors	<u>6,267.80</u>	\$65,245.74

Sundry Accounts are being discounted.

Bills Payable:

Due National Phono. Co.

16,100.00

There are no other notes made by the Company unpaid.

Edison 2/1 Exchange Acct.

Represents our liability to customers for records returned by them on the Exchange Plan, and for which the Natl. Phono. Co. have allowed us credit

1,475.25

The above accounts represent the Actual Liabilities and amount to

\$82,820.99

Capital Account

\$25,000.00

Surplus Account

13,607.91

Profit & Loss for year

17,743.38

Capital & Surplus

\$56,351.29

LIABILITIES CONTINUED.

A summary of the Assets & Liabilities show the following:

Available Assets	\$107,132.49
Actual Liabilities	<u>82,820.99</u>
Excess of Assets	\$ 24,311.50
Capital Assets	\$56,361.29
Liabilities	<u>32,039.79</u>
	<u>24,311.50.</u>

PROFIT & LOSS.

Schedule B & C.

Income:

The total income for both New York & Newark amounted to as follows:		\$308,066.32
New York - Schedule "B"	\$282,177.33	
Newark - "C"	<u>25,879.06</u>	

Charges:Purchases

The total Purchases for the year amounted to		\$234,432.07
As follows:		
New York - Schedule "B" 1	\$214,348.89	
Newark "C" 1	<u>20,083.18</u>	
Showing a Gross Profit of		\$ 73,624.32

Expenses for the year amount to 55,880.94

As follows:

New York Schedule B 2,	\$51,098.92	
Newark "C" 2,	<u>4,782.02</u>	
Net Profit for the year		\$ 17,743.38

As follows:

New York - Schedule B	16,729.52	
Newark - "C"	<u>1,013.86</u>	

The new issue of Preferred Stock has been subscribed and paid for, amounting to \$75,000, and the National Phonograph Company's indebtedness has been liquidated.

**Legal Department Records
Phonograph - Correspondence**

Foreign Copyright

This folder contains correspondence and other documents relating to musical copyright matters in Great Britain, Germany, and other countries. The selected documents cover the period 1908-1909. Among the correspondents are Paul H. Cromelin and M. Dorian of the Columbia Phonograph Co. and Horace Pettit of the Victor Talking Machine Co. The documents pertain to copyright provisions in British law and under the Berne Convention of 1886 and to cooperation between the National Phonograph Co. and its competitors, Columbia and Victor, on the foreign copyright issue. Included is a report by M. Dorian prepared for the Berlin Conference for the Revision of International Copyright Laws in October 1908, as well as a printed copy of Frank L. Dyer's testimony before the British Parliament.

Approximately 20 percent of the documents have been selected. The items not selected include printed reports, proposed legislation, and documents that duplicate information in selected material.



File - Copyright Laws

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R.M.S. "LUSITANIA"

Mr. Horace Pettit,

Sept. 21st, 1908.

Counsel, Victor Talking Machine Co.

Philadelphia, Penn.

Dear Mr. Pettit,

As proposed by you and Messrs. Dyer and O'Connell at our recent conference, I have given much thought to the best course to pursue with reference to the International Copyright Conference which will assemble in Berlin Oct. 14th. I have had a good opportunity on board steamer to review all the correspondence with our European Officials and to consider conditions as they exist in respect to the Mechanical Reproducer problem in its relation to Authors and Composer's rights in the various countries of the world.

All of us, I believe, fully appreciate the fact that whatever is done at Berlin will be of greatest importance in shaping and perhaps determining the course of future legislation in the United States and elsewhere. I am convinced that our efforts should be directed towards strongly opposing any change in the principle established by Article 3 of the Berne Convention of 1886, expressly granting freedom of reproduction. The maintenance of this principle and its re-affirmation at this time is of greatest importance to each and every manufacturer of mechanical musical instruments. To those American firms engaged in an export trade and who may be established either directly or through dealers in foreign countries, its maintenance is perhaps of graver moment than to those others who may for the present confine their efforts to the development of the Home market only.

Falling in this, our efforts should be directed to securing a declaration in favor of some fair and equitable universal Royalty arrangement, and beyond this under no circumstances should we be willing to go.

It will be an important victory if we can block any action whatsoever in the coming Conference as regards mechanical reproducers permitting matters to remain as they are at present. It will be infinitely superior work if we can secure from the Conference a re-affirmation of the Berne principle of 1886. It will be a victory still, if a declaration in favor of universal Royalty is secured for the interests back of all this agitation and whose influence has resulted in the coming Conference are not seeking nor will they be

satisfied with any such result. They will leave no stone unturned in behalf of the "poor composers?" to secure full and complete protection against reproduction by means of mechanical instruments.

It seems to me, regardless of the question as to whether or not the composer has any ethical right, about which there is room for an honest difference of opinion, that it is the duty of all manufacturers to unite and make a mighty effort to secure for the future a continuance of those rights which they have always enjoyed in the past. Unless one takes the time to stop and consider what is going to happen under the fairest form of universal Royalty, one has no idea of the extent to which such a scheme will hamper and retard the future growth of our industries, and the almost insuperable difficulties in the way of carrying out such a plan in practice. Of one thing we may be certain; the composers will not be the real beneficiaries; and we have no obligation legal or ethical to the publishers. It is not difficult for me to picture a condition, unless the matter was covered by International agreement in the clearest and most express terms, where records for talking machines, perforated sheets for piano players, music box sheets and the like, which had complied with all the laws of the country in which the manufacture took place including payment of the Royalties to the owner of the copyright, would be subjected to the liability of confiscation in other countries unless additional payments were made to the owners for the time being of the particular copyrights involved in the country or countries to which such records were shipped. The difficulties which might confront us seem to call for the exercise of every honest effort to prevent if possible any action at Berlin opposed to our existing rights and to the natural healthful development of our industries in the future.

It is said that the coming Conference is to be purely diplomatic; but as it is to deal with an intensely practical commercial proposition and as we, not the altruists, academicians, and theorists are most in interest, we must approach the subject from a thoroughly practical standpoint and in my opinion regardless of whether we are able to succeed or make our influence felt, adopt a course about as follows:-

I shall precede what follows by reminding you that should I undertake the work it will be not because I seek but because the suggestion comes from you and Messrs. Dyer and O'Connell, due to the fact that I am going to be near to the scene of battle; and I presume to say because on account of my past connection with the fight, several years residence in Berlin and intimate knowledge of copyright conditions in each of the great European countries, I may be peculiarly suited for the mission.

1. While in England I should make it my business to get in touch with all the leading interests who can be depended upon to assist on our side of the fight and after ascertaining what has been done so far, engage their active support in an effort to win over the British representatives at Berlin so as to have them champion our cause.

2. In Germany, I should retain one of the leading counsellors especially versed in the laws respecting copyrights. There are a few leading men who are always found in important litigation in Berlin and one of these would be selected, preferably the one the best posted either because of having been connected with litigation involving this or kindred subjects. I am personally acquainted with several of the leaders but cannot say at this writing who would be selected until I can get nearer to the field of operations and see after considering the whole matter who it would be best to employ. I should arrange to secure as much of his time as might be required for consultation, appearance before the Conference if possible, preparation of petitions, briefs, etc. and co-operation in the furtherance of such plans as I might decide upon from the date of employment until after the Conference adjourned.

3. I would arrange for a meeting of all the German manufacturers, many of whom are already thoroughly aroused and would do everything possible to stiffen up their backbones and increase their indignation at this attack on German industries. Many of these men are personal acquaintances and friends.

4. I would employ a secretary for such time as I might need him capable of speaking and writing French, German and English perfectly and who because of former association and environment would be able to secure audiences with persons in diplomatic circles, delegated to the Conference etc.

5. I would probably find it necessary to make a quick trip to Switzerland to secure the active assistance support and co-operation of the Swiss manufacturers and Swiss delegates to the Conference.

6. I would personally approach as many of the Delegates as could be seen prior to the opening of the Conference laying before them our side of the story and soliciting their aid, co-operation and support.

7. I would secure to the extent possible the assistance of as much of the German press as could be influenced to print material favorable to our cause.

8. I would unstintingly entertain such of the Delegates newspaper men, and others, whose influence might be secured by good fellowship for our side, or who might otherwise be helpful.

I have estimated that to carry out such plans as I have proposed above, having in mind the importance of the matter at issue and figuring conservatively would require twenty-five hundred dollars (two) at least. I run to think that figure depending largely upon the publicity and. It cannot be done right for: such

below that figure if we expect to employ such people as might be reasonably expected to do such work well, and the expenditure must be made if at all with the understanding that we may not be able to accomplish our purpose at all. We all know from what Mr. Currier and others have told us that the action of our Congress will be largely guided by what is done in Berlin. If we succeed we will save ourselves much future worry and the loss of large sums in time and money required in watching and shaping legislation in the United States and elsewhere. If we fail the amount contributed by each individual firm will not be enough to cause it much concern.

Coming abroad as I have on an entirely different mission I have had no time to consider this subject with my own people nor to communicate with the members of the American Musical Copyright League. Having in mind the interests at stake I believe that if the expenses were shared as follows it would be fair to all:

Columbia Phonograph Co.	\$500
National Phonograph Co.	500
Victor Talking Machine Co.	500
National Piano Manufacturers Assn.	500
American Musical Copyright League	500
(excluding Columbia & National Co. separately mentioned above)	<hr/> \$2500

If this matter were called to the attention of the Welte Mignon Player Co. New York, they would probably be willing to contribute to such a fund. Possibly the Kimball Co. and the Melville Clarke Co. of Chicago would also contribute.

You will realize that the all important element now is time. As requested by you I am despatching this letter from Queensdown which point we will reach early to-morrow morning. In order that my movements can be made intelligently and most effectively it will be necessary for me to have your cable instructions and be put in possession of the necessary funds at once. I suggest that if you approve you deposit with our Company in New York your contribution with instructions to transfer same to me through our London office, or if you prefer you can transfer same telegraphically direct.

My telegraphic address will be - Cromelin, Fibrillouse
London.

In any event so that I may govern my movements, even if you decide for any reason that you do not wish me to act please cable.

I am sending a copy of this letter by same mail to Mr. Frank L. Dyer, Orange, New Jersey, J. J. O'Connell, 31, Nassau St. New York. E.D. Banton, President, Columbia Phonograph Co. New York

-5-

Albert Krell. Vice-president & Treasurer, American Musical Copyright
League. Connersville, Indiana.
Trusting this finds you well, and awaiting your ad-
vices,

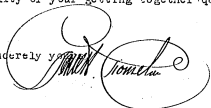
I remain,

Very truly yours,



Dear Mr. Dyer, The above is a copy of a letter which I am dispatch-
ing to Mr. Pettit to-day. Copies have also been sent to the others
mentioned. I suggest advisability of your getting together quickly
and will await cable advices.

Sincerely yours,



Mr. L. Dyer,
President,
National Phonograph Co.
Orange, New Jersey.

F. L. D.

OCT. 6-1908.

Mr. Paul H. Cromelin,
c/o Columbia Phonograph Co.,
6466 Oxford St.,
London, England.

My dear Mr. Cromelin:--

Your favor of the 21st ulto. has been received, outlining your plans for the proposed trip to Berlin in connection with the International Copyright Conference.

While we have never agreed as to the details of Copyright Legislation, I certainly think there should be someone at the Conference who can represent the Talking Machine Manufacturers, and see that our interests are protected. Both Mr. Pettit and Mr. O'Connell have written me that they do not approve your plans, and have cabled you to this effect,-- but I cannot agree with them. Of course, if possible, any change whatever in the law should be opposed, but if the sentiment is strongly against us, I would consent to a modification that would provide for universal royalties. While you might not wish to go so far in committing your own company, I wish, should you represent me at Berlin, that you would make my position clear, if necessary. The withdrawal of Messrs. Pettit and O'Connell from your plans, may prevent them from being carried into effect, but if you do go, I am willing to contribute \$500. toward your expenses, as you propose; therefore, I have cabled you to-day as follows:--

"Pettit and O'Connell oppose your Berlin plans. If you conclude to go, will contribute five hundred."

I wish you much success, and hope you are having a pleasant trip.

Yours very truly,

President.

CABLE ADDRESS: "ZYMO TIC, NEW YORK."
ALL A.B.C. COMMERCIAL LETTERS
AND WESTERN UNION CODES USED.

TELEPHONE
1388 STUYVESANT.

FOREIGN DEPARTMENT
OF THE

NATIONAL PHONOGRAPH CO.
EDISON MANUFACTURING CO.
BATES MANUFACTURING CO.

10 FIFTH AVENUE.

NEW YORK, N.Y.

FACTORIES:
ORANGE, N.J. U.S.A.

EDISON PHONOGRAPHS
AND RECORDS.
EDISON PROJECTING KINETOSCOPES
AND ORIGINAL FILMS.
EDISON PRIMARY BATTERIES
AND TAN BULB OUTFITS.
BATES NUMBERING MACHINES.

LONDON, PARIS, BERLIN,
BRUSSELS, SYDNEY,
MEXICO CITY,
BUENOS AIRES.

36 2 New York, U.S.A.

Oct. 23, 1908.

Date Copyright
Mr. Frank L. Dyer,

President, National Phonograph Co.,

Orange, N. J.,

RECEIVED
OCT 24 1908
FRANK L. DYER.

Dear Sir:-

In accordance with your request, we have this day cabled
Mr. Graf, London, as follows:-

"GRAF TRY TO ASCERTAIN FROM COLUMBIA PHONOGRAPH
COMPANY LONDON OR BERLIN ADDRESS PAUL CROMELIN. PAY
TO HIM \$500.00 OUR SHARE TO PAY EXPENSES COPYRIGHT
CONFERENCE."

Yours very truly,

Melby Stevens
Manager Foreign Department

R/TB.

Copyright

NEW YORK.

CHIC.

PHILADELPHIA.

ST. LOUIS.

PARIS.

EXECUTIVE OFFICE

COLUMBIA PHONOGRAPH COMPANY

SOLE SALES AGENT FOR THE AMERICAN GRAPHOPHONE COMPANY.

EDWARD D. EASTON, President.
 GEO. W. LYLE, General Manager.
 E. O. ROCKWOOD, Secretary & Treasurer.



TELEPHONE CONNECTION.
 CABLE ADDRESS, 'COLPHO, NEW YORK.'

OFFICE OF THE PRESIDENT.

FACTORY: AMERICAN GRAPHOPHONE COMPANY.
 BRIDGEPORT, CONN.

TRIBUNE BUILDING.
 154 NASSAU ST.

NEW YORK CITY.

Hotel Adlon, Berlin Nov. 2/08

Mr. W. Dorian, Asst. Genl. Mgr.,

London England.

Dear Mr. Dorian:

You probably have wondered why I have not kept you posted as to the progress of our fight on the proposals made by the German Government relative to a change in the copyright laws as respects mechanical reproducers; and, particularly as you have contributed so much by your splendid analysis of the whole situation.

The fact is that since I have entered into the fight at this end I have been so busily engaged day and night, that there has not been much time for letter writing; but now that the International Conference is drawing to a close, I want to give you a summary of what has taken place here, and advise you as to the probable compromise which will result.

It became evident immediately after my arrival, and first interview with our Ambassador, that as an American, I could do but little. America is not a party to the Berne Convention, and its representative was to be merely a looker on, and take no active part in the proceedings. After paying a visit to Mr. Selberg, which he returned, at which time we took lunch together, I decided that it would be better in every way not to have even the appearance of embarrassing him with my presence, and I have not seen him since. The Conference being a diplomatic one, the public was excluded, and, such news as I have been able to gather from day to day has either come from unofficial sources, or if from any of the delegates themselves, I had to gather it from inference from what they would say rather than to be able to say that I had been told so and so.



THIS LETTER WAS DICTATED TO THE
 OFFICE GRAPHOPHONE.

M.D. (2)

I got quickly in touch with certain of the German manufacturers. To my regret, I found a greatly divided industry, and I was really astonished to learn how very little they knew of the whole matter, and the general sentiment, that it was hardly any use to make a fight, the Government having made the proposal, it would, as of course go through; and nothing that we could do would prevent it. A memorial was in course of preparation, and I found that this admitted the right of the Composer to exact a tax, and that Meinhardt the lawyer who was preparing it was firmly of the opinion that not only would the future be covered, with the provision for universal royalty, (fair indemnity, to be determined by the courts in case of dispute), but that after the Convention was signed, we would not have the right to make records of pieces composed in the past, but in which copyright still subsisted. To my astonishment and disgust, I found the opinion quite general, that, while we were not to be disturbed for records made in the past, for all future manufacture after a certain date, we must recognize the rights of the copyright proprietor. Well, we had a meeting of the Association of Talking Machine Manufacturers, and I had a chance to talk to them for over an hour, explaining the whole situation, how and why we must insist on complete immunity for all pieces published prior to any change in the law, how the proposals of the German Government if they went through as made would result in effect in a complete monopoly and our opponents would get for all practical purposes, everything they were seeking; how any such scheme that covered the past as well as the future would make it possible, through collusion between publisher and a favored manufacturer to nullify the supposed universal right, and how by the time the courts had determined the matter, the one so favored would have all of the business that was worth having from the particular selection in dispute; how and why we must do everything possible to get through the passage of some resolution covering a scheme for universal royalty which would be practicable, try to avoid the possibility of double royalties, and when it appeared that our opposition to any change in the law was to be ineffective, how and why we should insist on protection to the phonogram from counterfeiting. As a result they agreed to appoint a Committee to work with me, and next day telegraphed and telephoned to others in Hanover and Leipzig inviting them to a second meeting. At this meeting we read your History and Analysis of the whole movement, the same having been translated to the German in the meanwhile. I have already advised you through my letter to Frank of the result. When the whole scheme was understood, they were with me to a man.

The Gramophone Co., had in course of preparation, an important memorial, which unfortunately from my viewpoint, also admitted the right, and provided for an elaborate scheme, for protecting the manufacturers as regards records made in the past, and contained a plea for an extended time during which they were to be permitted to use matrices made in the past. Fortunately I was able to persuade Cohn their manager, to cut out much that was damaging (totally unnecessary admissions against interest), and to add several things of importance, my idea being that all the rest of us would stand absolutely against any change in the law, but fall back to the position taken by the Gramophone Co., when necessary. I was also able to revise the English translation before it went to the printer and to tone and strengthen it, adding, (with Cohn's permission) quite a good deal to the English version that does not appear in the original German.

We then prepared on behalf of the other manufacturers, (except National Co., whose representative was then acting on special instructions that the matter was being handled from headquarters), ^{a new memorial} and swung completely round from the original position and opposed ^{any} change in the law on the ground principally, the IT WOULD RUIN THE DEUTSCHE INDUSTRIE.

M.D. (3)

It is not necessary to say where we got them, but we succeeded at the last moment in getting exact copies of two of the monopolistic contracts made between publishers and Fonotipia, and we published them as a part of our memorial. A Delegation was sent to interview the German delegates, and to personally present the same on behalf of the industry. The Gramophone Memorial, was supplemented with a third contract between publisher and Fonotipia. They were working hard through the British Delegation, and their Memorial was sent to all the Delegates in German and English. The Joint Memorial which was also signed by Gramophone, was printed in German and French and a copy in French sent with the German, to every Delegate. Meanwhile the question had not been reached by the Conference, and your Analysis was being whipped into shape in French, and printed in French and German. We got it all finished and had the satisfaction of delivering a copy in French, German and English together with a strong letter commending it to the attention and study of the delegates, on the day before the matter came up for discussion. The letter accompanying same was also sent in French, German and English. Meanwhile, we were seeing such delegates as could be reached, including the Swiss Ambassador, to whom we made a strong appeal, and I kept in close touch with Sir Henry Borge, and his colleagues of the British Delegation. By the way, I had great difficulty in persuading Sir Henry that the mere granting of the right to use such matrices as we now had, and prohibition in the future would not be substantial justice. That was his position for several days, and it was hard to budge him from it. Mr. Asquith however, was more inclined to my view, and of course, I insisted on complete indemnity and freedom for all pieces published in the past. In course of time, it became evident, that the work we had done and were doing was bearing fruit. The Italian and French delegates were making a big fight to not only cover the past, but the future also, and without any mention of universal royalty.

We had sent a delegation to Leipzig, to work up interest on the part of all manufacturers of mechanical musical instruments, and they appointed a Committee to co-operate with us. I went to Leipzig with five others including Director Wilm of National Phonograph Co. who had in the meantime received instructions to work with us. As a result of our Leipzig meeting, a strong telegram was sent to the Secretary of the Interior, the President of the Conference, and to each German Delegate, pleading for further consideration of the subject, and a chance to be heard ~~before~~. This was signed by thirty-six firms the largest makers of mechanical instruments in Germany, headed by Hupfeld of the Phonola Company. We also sent out from Leipzig, an urgent letter to about one hundred firms, explaining the situation briefly, and urging them to send telegrams at once to the Secretary of the Interior and to the President of the Conference, stating that the proposed change would injure them, and asking for further consideration of the matter. These letters were sent to various manufacturers, who deliver raw material to the makers of musical instruments, including firms in the metal, wood-working, clock-work, horn, chemical, etc. industries. Next day we returned to Berlin, and the telegrams began to pour in. Fifty-three came in one day, thirty-two the next. From the conference itself we heard unofficially that a great fight was on, and that it looked as if it would be impossible to reach an agreement. Practically all agreed that the phonogram was entitled to protection. Oh, by the way, the International Co., put in a strong memorial devoted primarily to this point, and it was being supported as much as we could by our personal interviews, though of course we could not ask for this protection and deny the Composer's right at the same time.

M..(4)

Sir

From Henry Bergne, I gathered finally that a scheme which to all intents and purposes would give us practically the right to continue to use all music published in the past was being considered. While I agreed to the proposal if nothing better could be done, I urged him to stand for the absolute right to use everything published in the past. The proposal appears later, and from rumour is the action to be taken by the conference. As to the future, his position was that he would not be willing to commit his government to the scheme for universal royalty, that it was a new and practically untried principle, opposed to the universal right which a person has, to dispose of his property as he sees fit. He finally asked me what I would think of a scheme by which each nation was to be left to decide whether it would make this a feature of the law or not. I argued against such a course, pleaded for similar action in each country, but he finally suggested that the difficulty was that they never could come to an agreement on that point. Germany was insisting on the scheme, other nations some for, some against. Please do not understand me to say that he told me this directly. You know there is a way by which one can spend a lot of time in saying nothing, and still give a vast amount of information: and what I am disclosing to you must be used guardedly, so that no injury may result even indirectly to anyone. You must also know that I feel very grateful to the members of the British Delegation for their splendid treatment of me.

From such knowledge as I gained with them, I saw that we must stiffen up the backbones of the Germans, so as to get them to stand firm, and for this purpose we had interviews with influential members of the German Delegation including the President of the Conference, His Excellency, Dr. von Studt. Last Saturday afternoon we had another meeting of the industry, and after reporting everything that had been done, it was decided, that we had gone our limit and could only await the result. To-day, there is a well defined rumour that they have decided on their course, and what has reached me is so concrete that I pass it along to you. In my opinion this is what will be done. If I am not right, will correct it as soon as I get exact information.

- (1) Everything that has been used in the past on any kind of a mechanical instrument is to remain free forever.
- (2) Anything, which up to the present has never been used on any kind of mechanical instrument, and all new composition published after the Convention is formally confirmed by the respective governments, is not to be used, without consent of the copyright proprietor.
- (3) The question as to whether a compulsory license is to be embodied into such laws as are passed in conformity with the action of the Conference, is to be left for each Government through its legislature to decide.
- (4) The product of the matrix is to be protected from unlawful multiplication.

I am informed that Germany will never pass a law that does not embody the compulsory license scheme; from good authority I learn that France will do likewise. I feel pretty sure about the U.S. with the Arabian and Fonotipia contracts before our legislators, that with the right to use everything used in the past, protection for our product in ~~the future~~ the opportunity still for fighting for compulsory license, comes up in the legislatures; we will come out of the Conference with much more than we had reason to expect and our opponents will be robbed of the fruits of their years of effort to get control of or lay out industries under tribute.

Very sincerely yours

Vice-President.

PHC

Berlin, October 1908.

Sir,

Respectfully referring to the special petition already submitted by the undersigned firms to the delegates to the International Copyright Conference, we have the honour to hand you another elaboration in three languages, which is to contribute to a greater elucidation of the standpoint set forth in the said special petition, rendering same more complete and conclusive.

The enclosed memorial presents a detailed explanation of the copyright situation as related to the mechanical reproducers and its voices the opinion of the industry throughout the world.

For this reason and in view of the carefully and lucidly compiled statistical material and the incontrovertible statements contained therein the undersigned respectfully submit and recommend that this highly valuable work receive your favorable consideration and be subjected to a thorough and close study.

We trust that as a result you will not support a scheme to take away rights which have been in existence for more than two centuries and which have been solemnly reaffirmed by Article 3 of the closing protocol of the Berne Convention of 1888.

Very respectfully yours

Anker Phonogramm-Gesellschaft m.b.H., Berlin
Beka-Record G.m.b.H., Berlin
Columbia Phonograph Co. m.b.H., Berlin
Dacapo-Record Co. m.b.H., Berlin
Deutsche Grammophon A.-G., Berlin
Ernst Hesse & Co., Berlin
Homophon-Company m.b.H., Berlin
International Zonophone Company, Berlin
Kalliope-Musikwerke Actiengesellschaft, Leipzig
Lyrophonwerke Adolf Lieban & Co., Berlin
Phonographenwalzen-Fabrik „Elektra“ Namslau
Polyphon-Musikwerke A.-G., Wahren b. Leipzig
Schallplattenfabrik „Favorite“ G.m.b.H., Hannover
Schallplattenfabrik Globophon G.m.b.H., Hannover
Vereinigte Deutsche Sprechmaschinen-Industrie G.m.b.H.
Berlin
Vereinigte Schallplattenwerke Janus-Minerva G.m.b.H.,
Hannover.

[ENCLOSURE]

Legal Box 127

BERLIN CONFERENCE,
FOR REVISION
of
INTERNATIONAL COPYRIGHT LAWS.

**Instruments Serving to
Mechanically Reproduce Music.**

HISTORY OF THE MOVEMENT
and
ANALYSIS OF PROPOSED LEGISLATION.

BY
M. DORIAN,
Of the COLUMBIA PHONOGRAPH COMPANY, Gen'l.

[ENCLOSURE]

With Compliments of
M. Nozani
INTERNATIONAL

COPYRIGHT LAWS.

The Berne Convention.

International copyright laws are embodied in a convention, familiarly known as the "*Berne Convention*," adopted at Berne, Switzerland, in September, 1886, by the International Copyright Union, composed of delegates from a number of Governments there assembled.

It was arranged that these conferences should be held once in every ten years. The second convened in Paris in 1896, and it was then agreed that the third should be held in Berlin in 1906, but this date was afterwards changed by diplomatic agreement to 1908.

The German Government has issued invitations to the other Governments and the third conference will convene on the 14th of October, 1908.

What is Proposed at Berlin.

A number of amendments to the Articles of the Berne Convention are proposed, which will modify or change completely some of the laws governing International Copyright.

The proposed amendment with respect to mechanical reproduction of music is as follows:—

- " XIII. Closing Protocol, 3.3. To authors of works of the tonal art or their legal successors before the exclusive rights in the countries of the Convention, in which, on the basis of this Convention, these their works are protected, to (a) transport (transfer) these on parts of such instruments serving for the mechanical reproduction of musical pieces, and (b) to permit the public performance of their works by means of such instruments.
- " Should the author have made use of the work or permitted its use in the above stated manner any third party can claim the privilege, against a reasonable compensation, of transporting, (transferring) and publicly performing the work in the manner as provided by the above paragraph, sub (b) and (c). It will be left to the inner regulation of each country of the Convention to determine in what manner the amount of said compensation in the case of a dispute should be fixed."

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How The Law Now Stands.

By Article 3 of the closing protocol of the Berne Convention it was declared:—

"3. It is understood that the manufacture and sale of instruments serving to reproduce mechanically the airs of music borrowed from the private domain are not considered as constituting the fact of musical infringement."

This was merely formal recognition of the law as it existed or had been interpreted for many years previously in the different countries. France, for example, had as early as May 16th, 1866—twenty years before the Berne Convention—enacted a law specifically declaring such instruments exempt from the copyright laws of the country, and its courts had upheld this statute in a number of instances. Other countries, including Switzerland, had similar laws in force. Others, including Great Britain and the United States, had so interpreted existing laws as to give them the same force and effect.

Since the Berne Convention of 1886 other countries have added to their statute law enactments which in spirit are identical with Article 3 of the Berne Convention. These countries are:

Great Britain.
Germany.
Belgium.
Italy.
Austria.
Hungary.

No change was made or attempted at the Paris Conference. Notwithstanding there have been two conferences (Berne and Paris) within the past twenty-two years the law has remained just as it was.

The fact is significant and important as will be shown further on. It will also be shown what are the motives underlying the present movement for a change.

What Has Inspired The Proposal.

To properly interpret the proposal we must know what has transpired since the Berne Convention of 1886, and the Paris Conference of 1896, and consider the attitude of authors, composers and publishers of music, and particularly the latter, during the same interval.

Since 1793 there has been a copyright law in France. It was enacted in the first year of the First Republic and has been in force ever since. For practically the same period there has existed in France an association of authors and composers known as "The Authors' Rights Society" formed for the purpose of protecting the rights of authors, and clothed by the law of the land with ample powers to enable them to effect that purpose. The Society has been most diligent and active during the whole period of its existence.

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It is charged, among other things, with the duty of collecting from all theatres, concert-halls, and other amusement houses, the royalties or taxes due to authors and composers. In enforcing these claims it has had the support of the officers of law even to the extent of closing places of amusement whose proprietors resisted the claims of the Society. Wherever copyrighted music has been publicly produced the tax has been demanded and payment enforced. The Society has gone so far as to insist upon this payment in the case of cafes and restaurants where an orchestra has been employed for the entertainment of the guests of the establishment, basing the tax, where no admission fee was charged, upon the amount paid the performers composing the orchestra, on the assumption that the employment of an orchestra by the proprietor represented to the latter a minimum value equivalent to the amount paid the performers. The law upheld the claim. The above instances are cited to show how thoroughly and conscientiously the Society has administered its trust.

In the year 1897 an American Company, the Columbia Phonograph Company General, opened an establishment in Paris, France, for the display and sale of their talking machines. One portion of their display consisted of a number of machines which automatically reproduced a selection of music recorded on a talking machine record whenever a coin of a fixed denomination was deposited in the coin chute or "slot" of the machine.

This display was a decided novelty in Paris and large numbers of visitors entered the establishment to listen to the machines.

There was no charge for admission but the agents of the Authors' Rights Society declared that the operation of the machines was a public performance of copyright music, and promptly claimed and exacted the payment of a tax of ten per cent. (10%) of the total takings of these automatic machines.

No attempt was ever made by the Society to prohibit the recording of these selections of music on the talking machine records, nor did they at any time question the right to make such records.

The reason was plain. By the statute known as the Act of May 16th, 1866, previously referred to, France had declared the manufacture and sale of instruments serving to mechanically reproduce airs of music as not constituting musical infringement.

It is clear from the above recital that the French laws relating to copyright are exceptionally liberal, and that the powers conferred upon the Authors' Rights Society in France are more than ordinarily large and comprehensive. The control of public performances which it exercises is unique. No other country, with the possible exception of Italy, grants such powers. For these reasons it will be un-

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necessary in the succeeding pages to refer again to this feature of public performance inasmuch as it has no material bearing upon the issues involved.

The success attending the display of automatic machines by the Columbia Phonograph Company General, inspired others to open similar establishments in Paris. Among them was one Lucien Vives who opened an exhibition of the kind, to which he gave the name of "La Fauvette," and to which admission was free. Promptly the Agents of the Authors' Rights Society appeared and exacted payment of the tax, as had been done in the case of the Columbia Phonograph Company General. Vives found the tax a burden and he made numerous unsuccessful efforts to evade it. He studied carefully the laws under which the Society operated and in the course of his researches he necessarily had recourse to legal aid. He contended, or had suggested to him, the possibility of an immense speculation. If the control of copyright music in its relation to talking machine records could be secured, the revenue from the royalties squeezed from the manufacturers of these records would be almost incalculable.

The fact that a statute existed which expressly exempted these records and other mechanical devices from the penalties of copyright infringement, and that this statute had been upheld by the courts, did not deter him, because he evidently regarded the matter as a speculation, and decided to take the risk.

He approached the different music publishers (not the authors or composers he it noted) with a proposal to undertake at his own expense a test case and to carry it through the courts if the publishers would assign him a part of their rights for a period of years and authorize him to use their names as plaintiffs in the action.

He presented the matter in such glowing colours that a number of the publishers entered into contract with him by which they ceded their hypothetical rights as to talking machine records on condition that he would bring the test action, and, in case of success, pay them a guaranteed sum on each record licensed by him thereafter during the period of the contract.

No contract was made by Vives with the Authors' Rights Society nor did this Society appear anywhere in the subsequent litigation. No author or composer figured in the matter. The speculation was confined to Vives and the publishers.

Beginning of the Agitation.

Vives began an action in the names of the publishers. The case came on to be heard and Vives was inconspicuously beaten. The Court dismissed the action. Vives appealed. By this time the newspapers and the public had begun to discuss the matter and to calculate the profits which would have accrued to Vives and the publishers had Vives succeeded in his attempt.

The cupidity of the publishers was aroused and instead of leaving Vives to bear the burden alone they actively supported him with funds and the force of their social and political influence. Long before the appeal was argued the rumor spread about Paris that the publishers were working like beavers to ensure favourable action by the Court of Appeals. Vives himself openly declared, long in advance of the hearing, that he would win in the Court of Appeals.

The decree was in his favour as to records which contained the words of songs, but adverse to him as to such as contained music without words. For example, if the "Soldiers' Chorus" from Faust be reproduced without the words the Court held this would not constitute infringement, but if the words also were reproduced infringement was established.

The decree of the Court of Appeals was rendered the first day of February, 1905.

Effect of the Decree.

As soon as the decree was announced Vives set in motion plans for reaping the harvest. His throw of the dice had been successful and he set about collecting the stakes. From one large concern he received no less a sum than \$50,000 paid him as indemnity for the past in order to secure from him permission to continue business. From other manufacturers he received smaller sums for the past, and from all of them large sums for current supplies of the labels which he compelled them to affix to the records as evidence of payment of the tax he levied.

Carries The War Abroad.

Vives sent his embassies to other countries to bring about deals with foreign publishers similar to those made with the French. The English publishers refused to treat with him, as they rightly concluded they could do for themselves all that Vives could do for them. In some other countries, however, he was more successful in arranging with publishers, and very soon after his victory in France suits of a similar character were instituted in Belgium and Italy.

In Belgium the law was similar to the French and exempted mechanical reproducers of music. The Belgian Courts rejected the claims of Vives and the publishers, the final Court of Appeals dismissing the case and holding that mechanical reproductions of music were not an infringement of musical copyright.

In Italy the final Court of Appeals has not yet passed upon the matter. The lower courts in Italy have upheld the claims of the publishers, notwithstanding that Article 3 of the Berne Convention was adopted by that country as part of its law of copyright. To justify its repudiation of this Article the Italian Court (lower) held that the articles of the Berne Convention were ratified by the King and that this was irregular and therefore, not binding upon the Court.

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It remains to be seen whether the Italian Court of Cassation (the final court of appeals) will confirm this repudiation of a solemn conviction.

Appearance of Competitors to Vives.

These efforts in England, Belgium and Italy consumed time and in the interval Vives and his methods were being imitated. Competitors sprung up and some of them came from the ranks of the talking machine manufacturers.

As soon as the French decree of February 21st, 1905, was announced, the International Talking Machine Company, of Berlin, Germany, began making contracts with music publishers in Germany, Austria, Hungary, Spain, Italy, Holland, and other countries on exactly the same lines as the Vives contracts, but with this important difference that instead of granting it power of licensing others to manufacture sound records from the files of these publishers, the International Talking Machine Company was granted a monopoly of the right of manufacture of these publications as to talking machine records in the event of a favourable decision in the cases which the International undertook to prosecute at its own expense. It is estimated that the contracts made in this manner by the International embrace eighty per cent. (80%) of the music publishers of Germany and of Austro-Hungary.

The controlling interest in the International Talking Machine Company is owned by Fonotipia, Limited, a British limited liability company. Fonotipia, Limited, has its own organization in Italy known as Fonotipia (Italy). The Managing Directors of the International Talking Machine Company, of Fonotipia, Limited, and of Fonotipia (Italy) are identical.

In Italy, Fonotipia (Italy) made contracts with the principal Italian publishers including Ricordi and Sonzogno whereby Fonotipia was given a monopoly of their publications for talking machine purposes in the event of successful termination of the cases before the Italian Courts.

Ricordi was given a block of shares in Fonotipia and made a director.

When the lower court in Italy announced its decision in favour of the publishers Fonotipia came to the front, as the custodian of the rights of the publishers, with demands for the payment of indemnities for past infringement, and is to-day receiving from the manufacturers payment of a tax on every record sold of selections taken from the works published by the coterie of publishers controlled by Ricordi and Sonzogno from what is known as the "second period." As to selections from the "first period" Fonotipia held a monopoly, and no other manufacturer can use first period selections without permission from Fonotipia.

By "first period" are understood musical works which are less than forty years old. By the "second period," those which are more than forty years old.

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International Talking Machine Company in other Countries.

In Austria, Hungary and Germany suits exactly similar to the French, Belgian and Italian were instituted, nominally in the names of publishers, but actually at the instance and cost of the International, the real beneficiary in the event of success.

Authors and Composers Conspicuous by Their Absence.

As in France so in Italy, Germany, Austria and Hungary are the authors and composers organised and represented by Authors' Rights Societies, but in none of these countries have the Authors' Rights Societies or individual authors or composers appeared as parties to any of the suits which have been carried through the courts. In every instance it is nominally the publisher but in reality the speculator. In not a single instance is the litigation due to a bona fide effort on the part of author or composer to prevent improper use of copyright music. In every instance the motive is the same—a purely speculative attempt to secure and maintain a monopoly.

Result of the Litigation.

In Austria the final Court of Appeals has declared that instruments which serve to mechanically reproduce musical works do not infringe musical copyright.

In Germany the lower courts have heard and dismissed three separate and distinct suits for the same reason, viz., that mechanical reproductions do not infringe. No final Court of Appeals in Germany has passed upon the question, but it is not considered possible, in view of the German law, for such court to reverse the judgments of the lower courts on this question.

In Hungary the lowest court held there was infringement. An appeal was noted and the case was remanded for new trial. The judgment was again in favour of the publishers and a further appeal was noted and is yet to be heard. It is expected the lower court will be reversed.

In France the Court of Cassation (the final court of appeals) by judgment rendered July 21st, 1908, affirmed the decree of February 21st, 1905.

In one European country only (France) has a final court of Appeals rendered a judgment in favour of the claims of the publishers and speculators. In this one case, however, the recognition is partial only because the court has declared that where the words of a work are not reproduced infringement does not result.

In Belgium the final Court of Appeals has held there was no infringement; that instruments serving to mechanically reproduce airs of music are free from copyright restrictions.

In England and America the courts have taken the same stand.

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Efforts of the Speculators in England and America.

In England the courts have again and again decided that a perforated sheet or roll for use on a Zolian organ is not an infringement of copyright. In the case of talking machine records also the English courts have held there was no infringement. The leading English case in this connection is the oft cited one of *Boosey v. Whight* (1900) 1 Ch. 122.

The latest case before the English courts was a prosecution at Bow Street in June of 1908 against James Connor, a hawker, who was summoned for having offered an alleged "pirated copy" of a musical work, to wit, a perforated music roll, being a reproduction of the pianoforte accompaniment of a song. The court (Sir Albert de Rutzen) decided that there was no evidence to lead him to suppose that the Legislature intended the words "written or printed copy of a musical work" to apply to a perforated roll for use with an Zolian organ, and dismissed the case. A second summons against the same defendant for offering in like manner a talking machine disc record was before the court at the same time, but was not proceeded with.

Frequent amendments to the copyright law of England have been made. The latest is known as the Musical Copyright Act, 1906. Paragraph 3 of this Act defines "pirated copies" and expressly provides that the expression "pirated copies" and "plates" shall not, for the purposes of the Act, be deemed to include perforated music rolls used for playing mechanical instruments or records used for the reproduction of sound waves, or the matrices or other appliances by which such rolls or records respectively are made.

In the English cases cited above it was a publisher who prosecuted. That the speculator has been busy in England, however, is a fact. The then exclusive agent in Great Britain of the International Talking Machine Company, previously referred to, made the statement in the presence of two witnesses that he had signed contracts with fully eighty per cent. (80%) of the music publishers of Great Britain whereby his firm was granted and guaranteed the exclusive right of publishing in the form of talking machine records the musical works owned and controlled by the publishers aforesaid, in the event that a law should be enacted in Great Britain bringing such records within the purview of the copyright law.

In the United States the speculative character of the efforts made there have been most clearly shown. The Supreme Court of the United States recently handed down a decision in a case involving the use of perforated music rolls. It was the case of *White-Smith Publishing Company v. Apollo Company*. The real plaintiff was not the White-Smith Publishing Company but a manufacturing concern engaged in the manufacture of piano players and perforated music rolls for use with the same. Its purpose was to secure

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a decision by a competent court which would hold that perforated music rolls constituted an infringement. It had previously secured contracts (fifty-two in all) with each member of the Music Publishers' Association, a close association of houses engaged in the publication of music, and similar contracts with other publishers not in the Association—making eighty contracts in all with the leading music publishers of the United States.

By the terms of these contracts this manufacturing concern was granted an absolute monopoly of the business of cutting perforated music rolls.

The name of this manufacturing concern is the Zolian Company—the largest piano player manufacturers in the world. The Zolian Company by its contracts undertook to carry a case through the courts at its own expense. All of these above stated facts were before the Court and were never contradicted or controverted. The case of *White-Smith Publishing Company v. Apollo Company* was carried through to the Supreme Court. That court held that perforated rolls were part of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination but cannot be considered copies within the meaning of the copyright law.

The following shows at a glance the status of the litigation.

For the Publishers.

France.

Against Them.

Belgium.

Austria.

Germany.

Great Britain.

United States.

Undeclared.

Hungary.

Italy.

Copyright in United States Congress.

The coteries of would-be monopolists, embracing the Zolian Company and the publishers, were not willing to risk everything in the courts and they cast an anchor to windward in the shape of a Copyright Bill which was introduced simultaneously in both Houses of the United States Congress on the 31st day of May, 1906. Following the usual practice these bills were referred to a Joint Committee of the Senate and House of Representatives which proceeded to hear interested parties on the subject of the proposed new legislation. It was established beyond doubt at these hearings that those sections of the bill affecting perforated music rolls and talking machine records were framed for the purpose of completing a plan whereby the Zolian Company

was to secure a complete monopoly of the sale of piano playing instruments and rolls.

A plan for a similar monopoly with respect to talking machine records was on foot.

Photographic copies of the contracts between the Molian Company and the publishers were filed with the Joint Committee and admitted in the record of the proceedings (see pages 299, 301, 302, 303, 304, 347, 348, 349, 350, 351, 384 Official Report of the Arguments before the Committee on Patents on the Bills S. 6130 and H. R. 15843 to Amend and Consolidate the Acts respecting Copyright—December 7, 8, 10 and 11, 1906. Published at Government Printing Office, Washington, D.C., 1906).

The hearing of the Joint Committee continued at intervals until the end of March, 1908. The original bills were abandoned and substitutes prepared which are still under consideration. These substitute bills, if either of them become law, will make it impossible for the Molian Company or any other concern or group of interests to create or maintain a monopoly.

Efforts in other Directions.

Failing to secure from the courts the aid they speculated upon (for with the exception of the half-loaf given them in France they have secured no final decree in any country) the speculators have turned all their guns upon the Berlin Conference in the hope and expectation of stampeding it and securing by International Compact what has been denied them under the already liberal laws of the respective countries.

Since Vives' successful appeal upon a legitimate and prosperous industry the capidity of the publishers and their speculative allies has known no diminution. The immensity of the scheme has inspired one of the greatest forays in commercial history. To lay an industry which is becoming world wide under perpetual tribute, or, better still, to bind it fast within the tentacles of a monopoly is the aim of these speculators.

They have prepared the way, as they believe, for an easy victory at Berlin.

They have tried moulding public opinion in a number of ways. By inspired articles in the Press; by loud protestations that the author and the composer was being robbed by "brigands" and "thieves," and that sacred rights were being violated.

They have convened conferences and conventions and have passed resolutions all intended to influence the action of the Berlin Conference.

All this in the name of the author and composer, but the real author and the real composer is like the good little boy who is neither seen nor heard. In all this agitation, which started in 1905 when Vives secured his first decision, only an occasional author or composer appears.

[ENCLOSURE]

It is always the publisher and back of him the speculator. In their conferences and their conventions there is never a word about contracts with International Talking Machine Company, Molian Company, or others. The silence as to this feature is so profound and so dense that it would require a sharp edged tool to make a dent in it.

The Neuchâtel and Madrid Conferences.

The conference of the International Literary and Artistic Association was held at Neuchâtel, Switzerland, August 26th-29th, 1907. From the extract of the report of the official proceedings the following are quoted:

- "The report limits itself to one sole question, which is at the present predominant, viz.: that of mechanical instruments of music, talking and singing machines which thrust themselves everywhere before the tribunals, and it demonstrates the vicissitudes of the struggle in favour of the rights of authors of original works; and is complicated by the different interpretations of No. 2 of the protocol of closure of the Conventions of Bern in Belgium, in Great Britain, in Italy and also in the United States."

"Mr. The Reverend has added to the list of sentences pronounced in Italy and in Hungary, or now awaited in Vienna."

Note. This is the same Ricordi who is a director in Phonofilm and who made the monopoly contracts with Phonofilm and the International Talking Machine Company.

"Then in spite of the advanced hour, the Conference listened with sustained attention to a luminous address given by Mr."

"Mr. Ricordi upon the question of mechanical instruments of music, a question which, according to the orator, will be the principal subject of argument at the future Conference in Berlin."

"Mr. Ricordi showed by figures the propitious state of business in the talking machine industry, which are included Phonographs, Gramophones, etc.; he cited the enormous sums (Note No. 1) which have been paid to singers and artists who have sung in these instruments, and which constitute discs and cylinders prepared as carefully as veritable documents."

"deposited in a library; the action brought against manufacturers, the negotiations engaged in with them to arrive at an understanding and the offers of trifling character which they made to publishers of successful music and their assigns, the method of division of the pittance received by the editors and composers, the views adopted by the Congress and the result of the inquiry made by the bureau of editors representing the literary and artistic associations—representations which all tend toward the suppression of No. 2 of the protocol of closure."

"Note No. 1. The International Association received 12,000 frs. and in addition royalties for singing in the six Gramophone discs, and 100,000 frs. in 1906."

"The address was a direct appeal to the capidity and greed of his auditors made by a man who at the moment of making it was a participant in a contract which aimed at creating a monopoly in which no provision whatever was made for the author and composer."

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Mr. Riccioli was present as a delegate and as representative of the International Congress of Editors (Publishers) of which he is president.

Another speaker who followed the same line of argument was Mr. Albert Osterrieth who represented in the Conference the following organizations, viz. :—

International Association for Protection of Industrial Property ;

Association of German Authors ;

German Association for Protection of Industrial Property ;

Berlin Society ;

Society of Industrial Art at Berlin.

The effect of these appeals was manifest in the concluding paragraph of the report which records that

" thus enlightened the Conference adopted without opposition
" the section which declares illegal all unauthorized transcriptions
" of works on mechanical instruments of all kinds."

In May of 1908 there was held at Madrid the Conference of the International Association of Editors (Publishers) and at this Conference the mask was entirely removed ; the publishers came out into the open and clearly showed their hand.

The following are extracts from the report of the proceedings :—

" The inquiry concerning the problem of mechanical musical
" instruments which has permitted the statement of absolute
" accord of views as to the necessity of revising the Convention
" of Bern in the sense of suppression of all privileges in favour
" of this industry."

" * * * * *

" Recognition of an absolute right, not solely a right limited
" by a system of license, with regard to the reproduction of
" works by the aid of mechanical instruments of all kinds."

" * * * * *

" The demand for complete protection against the mechanical
" instruments will encounter but a timid opposition, combatted
" by the argument that it is sovereignty subject to remuneration
" the artists who speak and sing into the instrument without
" revealing the author of the original work. Among other
" things the third section had, on the report of Mr. Enoch, energetically claimed the abrogation of the fourth paragraph of the
" protocol of closure of the Convention of Bern and that of
" the French Law of 1890, and had adopted with this aim the
" resolution voted by the International Literary and Artistic
" Association at the Neuchâtel Conference."

" * * * * *

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" Protection full and entire of authors and composers against
" the reproduction of their works by means of musical instruments
" of all types."

" Of the instruments for mechanical music. The Congress approved
" without reserve the project of the text hereafter, adopted in
" 1897 by the Conference of Neuchâtel of the International
" Literary and Artistic Association, and destined to replace
" No. 3 of the protocol of closure of the Convention of Bern."

" Specially comprised among the illegal representations to which
" the present Convention applies are the indirect appropriations
" not authorized, of a literary or artistic work, such as the adoption,
" arrangement of music, transformation of a romance, a novel,
" a poem, dramatic work, musical drama or vaudeville, etc.
" The reproduction of a work on organs, interchangeable or not,
" destined for the execution or the projection of that work by
" means of mechanical instruments such as musical instruments
" for cylinders and discs or perforated cards, the phonographs,
" cinematographs, etc., is equally considered as illicit."

The Mr. Enoch referred to is the French Music Publisher of that name who was one of the first to enter into the contract with Vives and who has ever since been the most prominent of all the French publishers in the subsequent developments in France.

Added to cupidity and greed is envy of the great artists who by the supremacy of their art are able to earn large honorariums, forgetting or ignoring that it was the artists and not the work which commanded these large fees.

Supreme Effort to be Made at Berlin.

Starting about the year 1898 with the Vives speculation the scheme has grown to its present immense proportions—until it embraces the entire civilized world. The aid of the courts and the legislative bodies of the principal countries has been invoked with but indifferent success, and now a supreme effort will be made to control the Berlin Conference and to give to this International Combine the control of millions of money to which they can lay no shadow of claim or right in law or in equity.

In the light of what has gone before ; of the resolutions of the Neuchâtel and Madrid Conferences, and what is known of the aims and motives of the promoters of the movement, it is not difficult to arrive at an understanding of the Berlin Conference of the proposed amendment to be submitted to the Berlin Conference.

Article 3 of the Bern Convention has been a stumbling block to the publishers and the other speculators and it is proposed to remove it bodily, and to substitute for it a new Article, having the same legal and moral force because adopted at a convention or conference of the same solemnity and importance, which will give them practical control of an industry, with the upbuilding of which they had nothing to do, and to which they have contributed neither capital nor brains, nor any other form of aid.

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A Radical and Dangerous Proposal.

The proposed amendment is the most radical legislation imaginable. It completely overthrows existing conditions and established laws; annuls Article 3 of the closing protocol of the Berne Convention, and substitutes for it an absolutely new and drastic principle never before recognised or admitted in any copyright statute of any country. It gives to authors and composers and their legal successors rights which have no foundation in natural or statutory law, or any basis in equity, rights which no nation has ever heretofore conceded them.

It is dangerous legislation because it disturbs lawful vested business interests of long standing, and is destructive of industries in which enormous capital is invested and large numbers of people are employed. It invades the domain of patents and renders null and void letters patent solemnly granted for new and useful inventions.

Mechanical Reproductions.

As previously stated Article 3 of the Berne Convention did nothing more than put into formal phraseology recognition of the law as it had existed for a long series of years.

Mechanical appliances for the reproduction of musical sounds were not new at the date of the Berne Convention. The following interesting historical data is published by Albert H. Walker, Esq., of the New York Bar, an eminent American lawyer and authority on Patent and Copyright Law, in an illuminating and comprehensive brief, filed by him in the Supreme Court of the United States in the case of the White-Smith Publishing Company v. The Apollo Company. His brief was filed by special leave of the Court and constitutes a complete history of the subject of copyright in England and America going back to as early as 1649.

Mechanical reproducers of music had been known as early as 1751 when a British Patent was granted to Justinian Moore for an automatic organ.

In 1762 the Earl of Bute had built for him an automatic organ. "It had sixty cylinders, each of which was four and a half feet long with projecting pins so placed as to open and close valves in pipes and thus audibly perform whatever music was followed in setting the pins on the cylinders. In 1787 this organ was supplanted by another built for the Earl of Bute by Mr. Cumming. Both are described in a pamphlet published in London in 1812 entitled "Cumming's Machine Organ, a Sketch."

In 1775 there was published in Paris a still extant book of 235 pages entitled "La Pantomime, ou L'Art de noter Les Cylindres." It was a text book on the art of fixing pins upon the periphery of cylinders in such position that when rotated the cylinders would cause the mechanism of the instrument to perform whatever music was followed

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in locating the pins. This book proves that the art of making automatic musical instruments was far advanced in Paris in 1775.

Many small musical instruments or musical boxes were constructed in Paris in accordance with the instructions of the French book of 1775 and exported to different countries.

The Swiss were specially adept in the manufacture of these music boxes and for generations their manufacture and export have been a national industry of the Swiss people.

Perforated sheets of paper for use with automatic musical instruments are shown and described in British Patent No. 17,886 of October 7th, 1847, granted to Alexander Bain.

In 1842 a Frenchman named Seytre made a perforated paper sheet, in the form of an endless belt, for operating mechanical musical instruments and introduced such instruments into France and probably also into several other European countries.

It is clear from the above enumerated instances that instruments serving to reproduce mechanically the aim of music were not a new thing in 1866 when the French statute was enacted, and still less so twenty years after when the Berne Convention was held.

Alleged "Natural" Right.

Those who are promoting the present agitation took the ground that the French statute of 1866 and the Article 3 of the Berne Convention did not apply to talking machines because these were unknown at the respective dates, and that both the statute and the article must be so interpreted as to exclude talking machines from the exemption.

The Courts refused to give this interpretation, and the publishers now fall back upon the argument that a "natural right" justified an author or composer in monopolizing every possible use or expression of an idea.

Not a New Proposition.

This claim to a "natural right" is put forward as a new and unanswerable argument. It is neither.

Natural right as a doctrine applicable to copyright was raised in the case of Donaldson v. Beckett in the English House of Lords in 1774. The best report of this case is contained in Vol. 17 of the Parliamentary History of England, pages 933 to 1004 inclusive. Mr. Walter in his brief above referred to gives a most circumstantial analysis of this great case, which is epitomised in the three following paragraphs.

Lord Camden, one time Chief Justice of the Court of Common Pleas and Lord Chancellor of England, took the floor as a *per* and delivered an elaborate, learned, and

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eloquent argument against the theory of the existence of any common law or natural copyright in England, at any time in the history of that country. Among other things he said:—

"They forget their Creator as well as their fellow creatures, who wish to monopolise His noblest gifts and greatest benefits." Thirty-three lords considered the question. Eleven voted to affirm the doctrine of a common law or natural right, one did not vote, and twenty-one, or two thirds of the entire number, voted in the negative.

Immediately after the decision in the case of *Donaldson v. Beckett* the London booksellers induced the House of Commons to pass a new Bill for their relief. The House of Lords rejected this Bill June 21st, 1774. No attempt was ever again made in the English Parliament nor in any English court to maintain any contention that the common law of England ever included any copyright.

No Natural Property in Ideas.

The author is the absolute master of his idea or his work *only so long as it has not left his brain.*

Once it has materialised in manuscript form, been given public representation or published, the public acquires immediate rights in it. *It falls into the public domain.* Everyone may engrave the work upon his memory, recite it, and if it is a musical work, sing it or play it upon a musical instrument.

To this construction of the law the courts have given their approval.

There exists no property in ideas—musical, literary or artistic—except as defined by statute.

The only fact which exists is a statutory one.

In each country which has enacted laws for the purpose of protecting intellectual conceptions the same two-fold object is apparent, viz.:—

FIRST. To promote the growth of the liberal arts and sciences by offering to authors, composers, and inventors an inducement to disclose their ideas, discoveries, and inventions; and

SECOND. To give to the public the ultimate property in those ideas, discoveries and inventions.

The second object has always been the paramount one, because it is the interest of the public, the people, which legislatures must first consider, because they constitute the greater number.

In every country the laws governing copyright define the rights protected. When there is doubt as to the scope of the law and the courts are called upon to construe the meaning and application of the statute they look to the intent of the legislature and determine from that how far the law shall be stretched to meet the requirements of the particular case.

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A copyright is in the nature of a contract between the author and the public, whereby, in consideration of the benefits conferred upon the public by the publication of the composition or work, certain exclusive privileges are granted the author for a definite period. This exclusive privilege covers the making and selling of the *graphic representation* of the composition, or that which represents the composition to the eye, or by which the idea is set forth visually. In other words the state gives the monopoly of the *graphic signs* to the author, and the benefit of the *audible sounds* to the public.

To encourage the author or composer to put his idea into communicable form, to the end that the public may be entertained, instructed, educated and amused, the author and his legal representatives are given, for a limited period, the exclusive right of making and selling the *graphic or visual form* in which his idea may be conveyed. Anyone wishing to use it in this form must pay him for the privilege during the prescribed period of monopoly.

The idea, however, ceases to be his the moment it is published or disclosed. It falls at once into the common fund of public knowledge and becomes the property of the public.

At the end of the prescribed period the monopoly of making and selling the graphic form of the idea also falls into the common or public domain and anyone may use it in this form also.

So long, however, as the statutory monopoly of printing and selling the graphic form of the idea continues the public may not use such graphic form without the author's permission.

It is a contractual right which the author enjoys. The law says to him that if he will *communicate his idea* so that the public may benefit by it he may take in exchange for it the exclusive right of printing and selling the visual expression of it for a prescribed period.

There is no compulsion put upon the author. He is free to accept or reject the terms offered him. He may refuse to disclose his idea and thus deprive the public of all benefits in it. But if he once discloses the thought, the idea, or the work, and exercises the option afforded him by the law his *property in the idea passes from him for ever* and lodges at once and for all time in the public.

This inflicts no hardship upon the author. On the contrary it confers upon him and his legal representatives a very substantial and long continued benefit in that it permits of the transformation of an idea, which immersed in the brain of the author is wholly unproductive, into a tangible, productive, and remunerative asset. The greater the popularity accorded the idea after its publication the more remunerative it will prove to the author is the *graphic form*, of the sale of which he has the monopoly.

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The law protects him in the enjoyment of the monopoly and opens to him the courts of the land where his rights are infringed, tests applied to determine if these have been infringed, and suitable compensation awarded him.

In the courts the test has universally been *one of the eye*. Can the alleged copy be read by the eye? If it cannot it is not a graphic representation and does not infringe the author's copyright. If it can be read it is an infringement, and the courts apply the remedy.

The courts of many countries have been called upon to inquire into this right of the author, to apply the test and to award suitable compensation where the author's rights have been infringed.

The following are some of the latest decisions:—

The Civil Tribunal of the Seine, Court of Appeals of Paris, 1st Chamber, in the case of Maquet and others against Thibouville, decided, August 2nd, 1893, in a case involving the use of perforated cartons for use with mechanical music instruments, as follows:—

"Considering that the notation of the perforated cartons are
"as diversified as the instruments to which they are applicable;
"that supposing that an individual may recognize one of these
"instruments he cannot recognize the others and that admitting
"even that one initiated into a general tuition of the process,
"the truth still always be that works of music will never be edited
"in that form for the musical public. * * * * *

"Considering the perforated cartons as a movable part which they are
"none the less an integral part of the expression and constitute,
"by the escape of the sound, the soul of the instrument; thus
"the perforated cartons ought not to be considered as a musical
"infringement but simply as a mechanism of reproduction."

The Court of Cassation Belgium (First Chamber),—previously referred to, the final court of appeals of Belgium—May 2nd, 1907, in the case of Massenet and Puccini against the Compagnie Generale des Phonographes, Cinematographes et Appareils de Precision—in disposing of an appeal from a lower court, held:—

"Considering that the judge below established that the discs
"and cylinders (sound records) are only of an instrument
"of execution, * * * * * Considering that these
"machines have nothing in common with the conventional signs
"permitting one to read and understand the work which they re-
"produce, and that, limited from the rest of the instrument, they
"remain as to actual human knowledge, without utility."

"Considering that, in deducing from these findings of fact that the
"discs and cylinders do not constitute the edifice, the decree is
"superfluous."

"Considering then that it is superfluous decided that these machines
"have nothing in common with the conventional signs permitting
"one to read and to understand the work which they reproduce
"and that isolated from the instrument they are without utility
"they cannot be regarded as reproducing whether a literary
"or an artistic work. That it follows that the purview of the
"decree is sustained by these findings of fact."

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In other words the Court of Cassation sustained the findings of the Court below and dismissed the appeal of the defendants.

In the celebrated English case of Boosey v. Whight (1900) 2 Ch. 125, it was held after due consideration that the perforated music rolls employed in the piano player were not infringements because they have nothing in common with conventional signs permitting one to read and understand the work which they reproduce and that isolated from the machine they are without utility.

The English Parliament has recognised the justice of this decision. As late as 1906 in revising and amending its copyright laws it expressly exempted from the operations of the law talking machine records and the matrices and moulds for producing the same.

In the United States there have been numerous decisions in the same line where the courts have uniformly held that in interpreting and construing the law the term "writing" must govern and that as a talking machine sound record is in no sense a "writing" inasmuch as it cannot be read and one cannot understand from it, by an eye test, the work it reproduces it cannot be considered an infringement. The most recent American case is that of the White-Smith Music Publishing Company v. Apollo Company, previously referred to. When this case was before the United States Circuit Court of Appeals the court said:—

"We are therefore of opinion that a perforated paper roll, such
"as is manufactured by defendant, is not a copy of complainant's
"said notation, for the following reasons:—
"It is not a copy in fact. It is not designed to be read or actually
"used in reading music, as the original staff notation is; and
"the claim that it may be read, which is precisely disproved
"by the great preponderance of evidence, even if *it* *has* *been*
"established merely a theory or possibility of use, as distinguished
"from an actual use. The argument that, because the roll is
"a notation or record of music, it is therefore a copy, would
"apply to the disc of the phonograph or the barrel of an organ,
"which it would be admitted are not copies of the sheet music. The
"perforations in the rolls are not a varied form of symbols sub-
"stituted for the symbols used by the author. They are mere
"adjuncts of a sole mechanism in a machine. In fact the machine
"or musical playing device is the thing which appropriates the
"author's property and publishes it by producing the musical
"sounds, thus conveying the author's conception to the public."

The case is reported in full in the 147th volume of the Federal Reporter at Page 226, published November 29th, 1906.

The Supreme Court of the United States, as previously mentioned, has affirmed the decision of the Circuit Court of Appeals.

The Tribunal of Commerce of Paris sitting at Paris rendered a judgment, December 20th, 1905, in the case of The Societe Nouvelle d' Editions Musicales contre la Compagnie Generale de Phonographes, Cinematographes et Appareils de Precision, in which it held that sound records were not an infringement

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of copyright. In discussing the questions involved, it expressed the following views and opinions:—

- “ Considering that the question submitted to the Tribunal is—
- “ whether cylinders and discs for phonographs constitute a musical instrument or a reproduction of musical airs by mechanical means;
- “ Considering that the literary or musical property is of a particular nature, and is not to be considered as a mere commodity;
- “ Considering that the author is the absolute master of his work so long as it has not left his hands or has not materialized in manuscript form, but when it has been given public representation or published the public acquires immediate rights in it seeing that it falls into the domain public by expression of the period of legal protection.
- “ That every one may record the work upon his memory, recite it, and if it is a musical work sing it or play it upon a musical instrument.”

The Austrian Supreme Court of Justice, in the case of Döblinger v. Gramophone Company, decided June 15th, 1908 and previously referred to, said:—

- “ The *Aplandis* (Döblinger) are wrong in asserting the disc of the Gramophones merely as a medium used for manufacturing the disc itself cannot give a complete reproduction of any musical or other work, as it cannot, like for instance a sheet of music, be read.”

From the above quoted decisions—which may be supplemented by a number of others equally pertinent and apposite—it is clear that there never existed a natural right to a monopoly; and that the courts have uniformly refused to recognise the existence of one, or to stretch the law far enough to include one.

It follows then that the argument and the pretensions of the publishers are alike unfounded and untenable, and that if the proposed amendment is to be supported by appeals to the reason or judgment, some other and more substantial foundation must be laid.

It has been fairly and accurately shown that no natural or legal right exists or ever existed in author, composer, or publisher whereby they or any of them could justly claim the monopoly they seek to set up. Such a monopoly is contrary to the spirit and the intent of the law and antagonistic to the very purpose which inspired it.

If then the author, composer, or publisher has any other reason to urge why this monopoly should be conferred it has yet to be advanced. Certainly it cannot be upon grounds of equity because it is an axiom that he who would have equity must himself be equitable and this proposed amendment is anything but equitable.

Publishers Would Rob Public.

They propose to deprive the public of the right it has enjoyed since the beginning of copyright legislation. The public gave the authors all the rights the latter now enjoy, and

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certainly these are liberal and generous enough, retaining for itself one only, viz.: that of the benefit of the audible sounds conveying to the ears of the public the conception of the idea.

Not content, however, with these the publishers by raising the false alarm of “thieves,” “pirates,” etc., directed against the manufacturers of mechanical instruments, hope to divert the attention of the public while they flick from it the single right retained by it.

The publishers covet this one right because they believe it will place in their control not only the mechanical instrument industry, but many other things as well. It is the entering wedge. They will not stop at mechanical reproducers of music once they secure recognition of this alleged “right.”

It matters not to them that in covering the public's share they are trying to do exactly that thing which they falsely accuse the manufacturers of doing. They want it and that's all there is to it. It is part of their great speculative scheme to get it, and get it they will if they can.

This is their attitude. It is indefensible.

The principal motive actuating them is covetousness. They covet part of the profits which they believe are accruing to the manufacturers of mechanical instruments. They have tried to induce the courts to give them this; have spent enormous sums of money, time, and energy on the pursuit of this covetous aim, and, failing in that direction, are turning their energies, their sagacity, and their money towards securing new legislation, while raising the false hue and cry of “stop thief” to distract attention from their own movements.

Their raid upon the manufacturers has no greater justification than their raid upon the public, as will be seen from what follows.

Legal Status of Mechanical Musical Instruments.

As has been shown by the extracts from the brief of Mr. Walker previously referred to, devices for mechanically reproducing music are of considerable antiquity. Their number and utility have greatly increased in recent years. One type has been before the public only twenty-two years but in that comparatively short period has become recognised as a machine of widespread use and of permanent utility. This is the machine commonly and popularly known as the Talking Machine. Under this popular designation come Gramophones, Phonographs and Gramophones.

The first practicable machine of this type was the Graphophone invented by Bell and Tainter and patented in the United States May 4th, 1886, U.S. patent No. 341274. That was the fundamental patent and upon it the whole art of recording and reproducing sound has been built up.

This Bell and Tainter patent was sustained in law suits. It has given the name of “Graphophone” to the art, which

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is known in the United States Patent Office as the Graphophone Art.

It gave to the public a *reasonable* sound record—one that can be handled, taken off one machine and put upon another.

From the date of this patent the improvement in the art of sound recording has been stupendous and rapid. From a small beginning the industry has expanded until there is not a known country on earth where talking machines are not known and appreciated. The capital invested in the industry runs into millions, while the people employed by the different companies constitute an army of many thousands.

As the art has advanced new and useful inventions applied to that art have multiplied and have formed the subject matter of letters patent in every country having a system of patent law.

Patents are granted for new and useful inventions for the same reason that copyright is granted for a musical or literary creation, viz.: to promote the development of the arts and sciences. They are, therefore, upon the same plane and entitled to the same consideration, and to the same protection as copyright.

In fact the courts of all countries have given them ample protection and have treated all patents alike, discriminating in favour of no one industry nor against any other.

The patents embodying improvements in talking machines, or processes for the making of sound records for use with such machines have been before the courts time after time, and, where the improvement was new and useful, have been uniformly upheld.

It follows, therefore, that the talking machine has legal justification for its existence. It has been tried in the fire of judicial investigation and has emerged from the ordeal triumphant.

Its legal status is unquestioned and unassailable. It puts forward still another claim to consideration which is equally important. *It is the musical instrument of the public without rival.* No invention of the last two hundred years has made such impression upon the public. It has taken such a firm hold upon the affections of the public that any attempt to restrict or hamper its usefulness, or impair its attractiveness, will inflict injury upon a vast number of people.

How the Public Regard the Talking Machine.

Some conception of the universality of the talking machine may be formed from the fact that in Great Britain alone there were made and sold in a period of twelve months (1906-7) no less than *eight million* (8,000,000) sound records of the cylinder type, and approximately an equal quantity of the disc type. These records were purchased by all classes of society; by members of the Royal family, the nobility the middle classes, artisans, workmen and labourers.

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The reason for this universal popularity is simple in the extreme. The talking machine, alone of all mechanical devices, reproduces not only the air of music but the quality of voice, the artistic rendering of the performer, and brings to the ear of the listener all the tonal beauties which a trained and capable artist can impart to even the simplest melody.

No one can fail to see where the interest of the public lies in this matter. These mechanical devices have brought within the reach of all classes, the rich, the middle class and even the poor, the best the world can produce in music and song. The benefit rendered has been incalculable.

Prior to the advent of these devices good music in their homes was a thing quite beyond the means of all but the rich or well to do. Even to the fairly prosperous, grand opera, rendered by great artists, was a luxury rarely indulged. To the poor good music well rendered was a sealed book and a thing apart from their lives.

Now, however, the devices for mechanically reproducing music have revolutionised all this and in the palace, the mansion and the cottage can be heard sound records made by the world's greatest artists. The working man who cannot afford a pianoforte, or the expense of having his children taught the art of playing it, can and does afford a machine and sound records for the same, wherewith to amuse and instruct his family and to create and foster in them a love of music. The educational value of such a medium must perforce be considerable. These machines are in constant use throughout the world, and wherever there is one there is an owner whose rights are jeopardised by the proposed amendment.

The change has been brought about by *inventive genius* which has contributed automatic sound producing devices to the world.

No rights of the composer or publisher have been invaded or adversely affected in the slightest. They remain exactly as they were before, but have been rendered more valuable by increasing enormously the demand for the printed copies of the musical composition. This has been a direct result of the popularising effect of the mechanical reproducers.

The more widely the idea is disseminated the greater the demand for the printed copy.

So obvious is the advantage that the courts have taken judicial notice of it. The Austrian Supreme Court in its decision in the Dohlinger case, previously referred to, used this language:—

"A reproduction by means of the Graphophone induces a visit to the original performance; it popularizes the work (music and text), and it therefore of advantage both to the composer and the librettist. As regards the latter the Graphophone does not render the text book any the less necessary."

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This wonderful change has been brought about by the *operation of the patent laws*. The instruments which have been the medium through which the *benefits of these laws have been conveyed to the public* are under the protection of those laws, and to take away those benefits and to remove that protection would be an act of *gross injustice* to the public and the inventor alike.

The *publishers* who urge the perpetration of this injustice have not contributed in the slightest degree to the change. No just reason can be urged by them why they should be given even the least recognition in this respect, yet they have the effrontery to demand a *monopoly* of an industry which has been born, nurtured, and matured without their aid or encouragement, an industry which is dearer to the heart of the public than any other which is not occupied with the production of the necessities of life, and which, for that very reason, has excited the *enmity and greed of the publishers*.

If the proposed amendment be adopted at Berlin the *monopoly* becomes a possibility; that possibility will be quickly transformed into an actuality, and an immediate check given to progress in the art of sound reproduction. The industry, which has already added largely to the world's knowledge and happiness and which is capable of still further enhancing both, will come to a standstill. The elimination of the stimulating influence of healthy competition will constitute a most effective brake upon further effort to advancement or progress in this most useful and fascinating art.

The advance thus far made, considering the short time which has elapsed since Bell and Tainter's discovery, has been remarkable. The reason is to be found in the vigorously healthy competition which has existed among the different manufacturers, all of whom have been compelled to unceasingly strive for quality and perfection in their productions if they would secure and retain a compensating share in the business. With no many different forms of record on the market, it has become increasingly necessary for each manufacturer to keep his product up to the highest known standard, and, if possible, to be a little in advance of his competitors. This has acted as a spur to the industry and resulted in a more rapid development of the art than would otherwise have been the case.

Create the monopoly; remove the competition, and all will be changed. The growth and development of the art of sound recording and reproducing will be arrested midway and it will make no further advancement. The *public* will be as great a loser as the manufacturers.

What the Amendment Gives Publishers.

The amendment gives publishers the option of refusing permission to reproduce a composition, or to make such

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permission conditional upon the payment of a tax. *This tax must of necessity be added to the present cost of the sound record so that eventually it is the public which pays the tax.*

When it is considered that in Great Britain alone and in the short period of twelve months nearly sixteen million sound records were purchased by the British Public; that in all the principal countries of Europe, as well as in America, the purchases of records are on a correspondingly large scale, a fairly accurate estimate may be arrived at of the *great stake* for which the publishers are striving. If the tax on each record be placed as low as a farthing each the revenue will be colossal, so much so that the mind is staggered by the immensity of the scheme.

When it is further considered that all this wealth is to come from the *pockets of the public* and that the *publishers* give absolutely nothing in return for it, the *inequity* of the proposal must force itself upon the consciousness of every fair minded person.

To pass legislation of the character demanded would be to place the benefits which mechanical musical devices have brought within reach of the public in the *absolute control of a publishers' trust* already formed, well organised, and greedy to the point of avarice.

An Absurd Proposition.

In effect the publishers say to the public:—Notwithstanding that for more than two hundred years you have enjoyed a certain privilege which the law has reserved to you, and notwithstanding this privilege is dear to you, it is robbery on your part to exercise it. Give it to us and we will take good care of it. If you want to use it at any time in the future we can easily arrange about that. *All you will have to do is pay us a small tax and we will grant you permission.* If the public should ask what the publishers propose to give it in exchange for the relinquishment of the right, the answer will be:—“Nothing!” Could anything be more absurd?

Restricts Personal Liberty.

In the case of a sound record, such as a Graphophone or Gramophone disc, the effect of the amendment would be to interfere with personal liberty in the use of the voice or of musical instruments. The merit of the sound record is due to other factors than the musical composition. Its merit, popularity, and saleability depend upon the artistic ability of the performer or performers; upon their *artwork*, and the excellence of their rendition. It is a faithful reproduction of the *individual performance*, preserving not merely a register of the particular musical composition, but the very tones of the voice of the singer as given forth on the particular occasion when that special record was made.

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If the publishers are given the right to control sound records what is to prevent them from saying that it is unlawful for a vocalist to sing a composition anywhere, in a drawing room, a talking machine laboratory, or where you will, without their permission and the payment of a tax!

Mechanical Devices Entitled to Protection.

Enormous labour and capital have been expended upon the invention and perfection of these devices, and upon the processes employed in the making of sound records.

Those who have put their money, their energy and their genius in the inventing and perfecting of these devices and processes are just as much entitled to protection as the composer or publisher. They have been promised protection by the patent laws, which say they must be protected. They have gone on in the conviction that what they did they had a perfect legal right to do. They have built factories, given employment to thousands of working men, and have invested their capital in the business. They have conducted long and costly experiments which have resulted in discoveries of immense value to science, and which have added immensely to the educational facilities of the public.

Their interests are *vested legal interests* which are threatened by the proposed amendment which seeks to take away the value of these interests and to destroy or hamper an industry with the creation and development of which the composers and publishers have had nothing whatever to do, and which has not changed in any single particular the rights enjoyed by them, except to make them a hundredfold more valuable by augmenting considerably the sales of the copies of their published compositions.

Patent Legislation Should Not Be Incorporated in Copyright Enactments.

Mechanical devices are the creature of patent laws and are properly controllable by them. Patent law, while a cognate branch, is radically distinct from copyright, and a provision as to patents and *inventions* has no more place in copyright legislation than protection of a musical or literary work would have in a statute as to patents.

The rules of procedure are radically different and an attempt to combine them would result in the greatest confusion and uncertainty.

By the proposed amendments, for example, an important class of mechanical devices would be subjected to radical and unfair discrimination, and become subject to special procedures and remedies *not applicable* to any other mechanical devices. It is a legal absurdity—an abnormality abhorrent alike to law, and to that even handed justice to all which the law typifies.

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It is an invasion of the domain of the patent law which should not be tolerated.

Enormous Loss to Industry.

The loss already inflicted upon the talking machine industry has been enormous. The actual cash paid out in France and Italy as past indemnity, and for the labels which must be affixed currently to the records sold, amounts to several hundreds of thousands of pounds sterling, *no part of which will ever be recovered.* The sums spent for counsel's fees, court costs, printing and the like in those countries, and in Germany, Austria, Hungary, and Belgium amount to many thousands more.

The manufacturers have been subjected to every imaginable annoyance and interference with the view of forcing them into acceptance of terms. The disturbed and unsettled conditions induced by this agitation and its consequent derangement of business it is impossible to accurately estimate, but unquestionably it is colossal.

Publishers' Motive Unaltered.

The form of the proposed amendment is somewhat different from the publishers' previous proposals, but the substance remains the same. In any event the result would be to give them a monopoly.

If permission be granted to transfer a work it will be given only in exchange for a royalty or tax to be fixed by the publishers, and this tax it may be readily understood will be a heavy one. The tax once established, all subsequent grants will be upon the same basis. This leaves the way open for manipulation. By collusion between the publishers and the manufacturer to whom permission is first granted the tax can be set so high as to make it prohibitive for others.

By demanding from such others the same tax which the original licensee may agree to pay, the monopoly will be complete. Of course the original licensee may arrange for a series of rebates whereby the actual tax will be a nominal one, but equally of course this feature of the arrangement will be a secret one.

It is no answer to the above to say that provision is made for legislation in each country to fix the tax in case of a dispute. Before legislation could be secured or a case be carried through the courts the monopoly would be fully established and hard to destroy. The matter should not be left in that indefinite state. If the public is to surrender its right it should be on conditions sufficiently defined and accurately expressed as to avoid all possibility for appeal to the courts or the legislature.

The leopard does not change his spots. This is a gigantic speculation involving millions, and the speculation and

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publishers who have poured out their money in promoting the scheme are not going to abandon their aim at this late date. They have not changed their minds. They are as determined as ever but they have reconnoitred the ground and they are proceeding more warily; they are trying to cover their real purpose by hypocritical zeal in behalf of the author, but in their hearts they are crying monopoly.

The Inconsistency of the Publishers.

The publishers pretend that the inclusion in the catalogues of talking machine records of selections taken from their repertoires works them great injury, and is a hindrance to the sale of their printed copies of the same selections.

That this is untrue is shown in the conclusion reached by the Austrian Court previously quoted. The issue was squarely raised in that case and the court determined it in the manner stated.

The pretension is put forward by the publishers as a justification for their attitude but it is not put forward in good faith.

If an attempt were made to absolutely prohibit by legislation the recording on talking machine records of selections from their repertoires the publishers would be the first to come forward in protest, and their voices would be loudest in denouncing an attempt of the kind.

They realised, long before the Austrian court had an opportunity to pass upon the question, that the talking machine offered them the very best medium, without regard to cost, they have ever had for popularising and advertising their productions and they have used it freely and unsparingly. That it has been a cheap medium also has been quickly appreciated by them.

There is no manufacturer of talking machine records of any importance who has not received hundreds, and in some cases thousands, of letters from publishers and authors requesting to have their songs recorded. In many instances payment has been tendered.

There is at least one music publishing firm in Great Britain which prints on each copy of music issued a statement that "Talking machine records of this song are made by The ———— Record Company." There are others which have standing arrangements with manufacturers whereby their productions are insured this form of publicity.

In the course of the hearings before the Joint Committees of the American Congress previously referred to, one prominent manufacturing concern filed hundreds of original letters from publishers—some of them of considerable prominence—from all over the country asking to have their selections recorded. Some of these letters frankly admit

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that the talking machine has been the most helpful aid in stimulating the sale of copies of music the publishers have ever known. Some of the letters thus produced were from firms whose representative was present at the hearing to protest that the talking machine was a hindrance to the sale of the copies.

It must be clear from the above facts that the publishers are inconsistent, at least, in pretending that they have been wronged in this way, for, if a man be wronged by an act of another, why should he request and urge that other to continue to do that which inflicted the wrong?

Sowing the Whirlwind.

In the short space of nine years hundreds of thousands of pounds have been spent by the manufacturers in resisting the attacks of the speculators. In no fewer than eight different countries have they been forced to defend themselves against ridiculous and absurd demands put forward by these covetous speculators who seek to lay a popular industry under tribute. In five out of the eight countries the courts have ruled in favour of the manufacturers. In one the court, in a weak spirit of compromise, gave the speculators a half loaf, and in the other two the final decision is yet to be rendered.

If the proposed amendment be adopted at Berlin there will be a new crop of lawsuits in every country which participates in the Conference.

What the results of these suits will be it is impossible to forecast, but one thing is absolutely certain, and that is that if the publishers are granted the "rights" (P) which they so boldly claim, no manufacturer of mechanical devices will be allowed to conduct his business in security; the ordinary laws of the land will be powerless to insure him that liberty and pursuit of happiness which is guaranteed him under all just governments.

Why this condition of affairs should be created at the behest of a group—no matter how powerful—of speculators it is difficult to understand.

If something of value were given or even offered in exchange for it it might be debatable, but as nothing of the kind has occurred it savours too much of spoliation directed not only against a single industry but against the public as well.

Nor will the gift of these alleged rights content the publishers and speculators. Once the principle, that the composer and the publisher are entitled to a complete and absolute monopoly of a musical idea as well as to the graphic representation of that idea, is recognised, the publishers,

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who are in ninety-nine cases out of every hundred the owners of the copyright, will find ways and means of living other industries under tribute—of taxing more and more the public.

The Publisher Amply Remunerated Under Existing Law.

For a merely nominal fee (in Great Britain 5/-), paid at the date of registering, the copyright is granted for a definite period. *No other fees are payable to the Government during the lifetime of the copyright.*

On the other hand the *inventor who patents* a new and useful invention pays (in Great Britain) £5 *os. 6d.* before the sealing of the Letters Patent, and thereafter, in order to keep the patent alive for fourteen years, must pay to the Government in certain instalments, £50 *os. 6d.* If the *inventor* fails to pay any of the instalments as they become due his patent lapses and becomes public property. In many countries also there are provisions as to adequately working the invention, and failure to comply with these provisions, irrespective of the payment of the annual tax, also works a forfeiture of the patentee's rights and causes the patent to lapse and the invention to fall into the common fund.

No such restrictions or fees are imposed upon the owner of copyright. One fee only, and that a mere pittance, is exacted and thereafter he enjoys unique privileges for a long period of time.

On every printed copy of the idea which the public buys, the owner of the copyright has imposed his tax and that this tax is ample is shown (a) by the fact that every music publishing house of any age is *wealthy*. There are few if any poor music publishers. (b) The profit on every sheet of music sold, calculated upon the actual manufacturing cost, is several hundred per cent. This is notorious.

Every person who buys a sheet of music or the score of an opera or operette pays this tax. The artist who sings in a drawing room has first to purchase and study the music and has paid the tax. The amateur, the student, and the *talking machine manufacturer* all contribute, and the latter as much as any of them because he must have the music before he can make his sound records.

Thus the publishers would levy a double tax upon the talking machine manufacturer, and, if their scheme carries, upon the artist, the student and the amateur as well.

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CONCLUSION.

A brief recapitulation will be useful.

It is urged that the proposed amendment to the Berne Convention

- A. Is inspired by and is the direct result of the raid inaugurated by the man Lucien Vives in Paris in 1898 or 1899. That Vives was a rank outsider; neither author, composer, nor publisher, but a speculator pure and simple;
- B. That his success, due to the social and political aid and influence of wealthy and influential publishers, and to a weak spirit of compromise on the part of the French Courts, has excited the cupidity and greed of an international group of publishers and speculators;
- C. That authors and composers, as a class, do not benefit by the proposed amendment and have had no part in the agitation for its adoption;
- D. That the proposed alteration of the law is contrary to the interpretation of copyright legislation which has prevailed for nearly two hundred years;
- E. That the final courts of five different countries have ruled against such interpretation within the past three years;
- F. That the final court of only one country out of eight has even partially recognised the claims of the speculators and publishers;
- G. That the recognition, in the proposed form, of these demands would constitute confiscation, without just compensation, of rights which the public have enjoyed for two centuries;
- H. That it is contrary to the spirit and intent of the copyright law of all civilised countries; is inequitable, unjust, and ridiculous;
- I. That it is an invasion of the domain of patent law by copyright legislation, and, as such, dangerous and tending to introduce great confusion into a branch of legal procedure in which due regard for the interests of the public demand great security and uniformity.

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- J. That it is an unjustified and unwarranted attack upon vested legal interests of great importance, and upon an industry of solid merit in which the public has a direct interest ;
- K. That this attack is inspired by covetousness and greed, and is unsupported by a single legal or just reason ;
- L. That it establishes and perpetuates a monopoly ;
- M. That the beneficiaries of this monopoly have not, in the slightest degree, contributed to the creation, nurture, or success of the industry they seek to control ;
- N. That this industry so far from injuring them has been a potent factor in augmenting the value of the rights they now enjoy ;
- O. That no compensation whatever is given to the public for the additional rights demanded ;
- P. That the industry thus raised is built upon patent rights secured to it by solemn letters patent ; that the patentees have paid for these patents sums largely in excess of those paid by the owners of copyright ; that under their letters patent they are entitled to all the protection the laws afford them ; that these laws promise them ample protection, and *this protection they claim* ;
- Q. That the interests of the public demand the rejection of this claim on the part of the speculator, and that this rejection should be emphatic and final ;
- R. That the true intent of copyright legislation, viz., the promotion of the liberal arts and sciences, will be best conserved by refusing to place in the hands of an international publishing trust complete control of that one of the arts—music—which is the most dearly loved by the people ;
- S. That if it were desired to throttle and bind fast this particular art no more effective means could be devised than the proposed amendment.

For all of which reasons it is urged that the proposed amendment is harmful and radically wrong and should not be adopted.

*Copyright
Office B.H.*

Maison Works,
Willowden,
London, N.W.,
4th August 1909.

The Secretary,
The Committee on Copyright,
Board of Trade,
Whitehall Gardens, S.W.

Sir,

The attempts which are now being made to amend the existing Copyright Law so as to extend the protection of musical copyrights to Talking Machine Records and perforated Music Rolls, are of vital interest to the phonograph and other manufacturers whose output is to be affected by the proposed changes. The Berlin Conference recommended this extension of copyright protection, and if our interests are properly safeguarded we should welcome and support whatever recommendations the Committee may make to His Majesty's Government. It is to be remembered, however, that the proposed new right which is to be granted by statute never before existed in this country, it is the creation of a new class of property, and it is to be created at the expense of industries which have developed along

certain narrow lines and in which millions of pounds have been invested. The phonograph industry is now about twenty years old, and since its very birth phonograph records have been made of the current popular music so that users of the phonograph have been kept in touch with the various musical publications as they came out just as readers of newspapers are kept in touch with items of current news interest. The phonograph business in fact bears a much closer analogy to the newspaper business than to the music publishing business. Phonographs are of many types, some using cylinders of various diameters and others discs, but no matter what kind of machine a user might have he has heretofore always been able to obtain for use with his machine the record of any current popular musical work. To materially change the situation - to say to the phonograph manufacturers that they shall not use current music as it may be published, or to so modify the law that one favoured manufacturer might be able to monopolise the best part of musical compositions to the exclusion of his competitors - would work a very great hardship on these industries which have been permitted to develop along this particular line and under the protection of law. Not only have the industries been permitted to develop along this line but they have actually been importuned to so develop by the music publishers themselves, who, almost without exception in the past, have been only too glad to permit the phonograph manufacturers to use their sheet music and

thereby make it popular. If the law had always been broad enough to include and be infringed by the publication of phonograph records it is clear that the various talking machine manufacturers in electing to develop their business along this particular channel would have done so at their peril; but such has not been the law, and as we have said, this particular development has taken place in a perfectly valid and lawful manner. Evidence has been presented to the Committee showing that attempts have been made on the part of one powerful manufacturer to monopolize a large part of the musical compositions by contracts with various important publishers; a similar attempt was made in the United States, and the recent law in that country was therefore so drawn as to protect the Talking Machine manufacturers from the evil consequences of monopolization by a system of compulsory license. Whether the Committee may or may not be satisfied with the sufficiency of the evidence on this point, the fact cannot be denied that such a scheme would not be very difficult to carry into effect. A compulsory license is not repugnant to British institutions but is included both in the British and Canadian Patent Laws. The musical composers ought not to object to it because they will derive a substantial income by the award to them by the Government of a newly created property right. The manufacturers on the other hand are vitally interested in the question of compulsory licenses because otherwise there is grave danger of their industries being irreparably injured.

The necessity for a provision for compulsory license being recognised the question of the amount of the royalty arises. In the statement of 20th May 1909 presented to the Committee by the Gramophone Company Limited, with practically all of which we fully agree, it is suggested that the amount of the royalty should be 1d for each record. Such a royalty can be readily paid by the Gramophone Company whose records sell from 2/- or more up to 12/- or more, but in the case of Edison records, which sell for 1/-, the royalty is prohibitive. These Edison records sell to the public for 1/- but they are sold to factors for 6d. The actual cost of the records including the expense of the artist employed, material used, making moulds, obtaining copies therefrom, with advertising, selling and other expenses, is not far from 5d, so that a tax of 1d per record would be equivalent to a tax of 100 per cent. on the manufacturer's profit. A tax of 3d per record would be equivalent in the case of Edison records to 25 per cent. of the manufacturer's net profit. We see no reason why this tax should not be increased in the case of records selling for higher prices either proportionately or on a maximum and minimum sliding scale.

The United States law provides that the royalty of 2 cents or 1d per record shall be paid on all records manufactured embodying copyrighted music whether sold by the manufacturer or not. This was obviously an oversight on the part of the American law makers due to the fact that the American Copyright Bill was pressed

through Congress in the evening of March 3rd 1909 a few hours before adjournment on the following day at noon. Undoubtedly this error will be corrected at the next regular session commencing next December because it is now recognised to be a most harsh and unusual provision, since all manufacturers carry very large stocks of records in anticipation of sales which frequently never materialise and a considerable proportion are consigned to the paraphernalia.

We would respectfully submit that there should also be a provision in the law to provide for records which, although sold to factors or dealers, are later returned to the manufacturers as being unsaleable, and for which full allowance has to be made, because it is obviously unfair to require the manufacturers to pay royalties on records which they are forced to take back. It has been found in practice so far as The National Phonograph Company Limited is concerned that these returned records amount to 10 per cent. of the total sales, and a fair arrangement therefore would be to require manufacturers to account monthly to the copyright owners for 90 per cent. of the royalties payable to them the balance if any being adjusted annually.

We are heartily in favour of the suggestion which has been made to the Committee of including in the proposed law a provision for copyrighting the phonograph records themselves so far as they may evidence originality in production or special artistic quality. Such a provision in the law would put a stop to the piracy of records by unscrupulous and dishonest persons who might

thereby seek to evade the payment of royalty.

With these suggestions so far as our interests are concerned we believe the new Copyright Act would represent a fair and reasonable compromise between necessarily conflicting interests which on our side are in the nature of vested rights.

We are, Sir,

Your obedient Servants,
THE NATIONAL PHOTOGRAPH COMPANY, Limited.

Stanley L. Price.

Director.

Mr. FRANK LEWIS DTRA called and examined.

3611. (Chairman.) Would you tell us your capacity or qualifications?—I have acted as general counsel for a number of years for Mr. Edison, and I am also President of the National Phonograph Company, which is Mr. Edison's American Company, and a director of the National Phonograph Company, Limited, in London, which is the English Company. I appeared twice before the Joint Committee of the Senate and the House of Representatives in Washington, in connection with the American Copyright Act. I was under the impression that this Committee would not meet until the 15th of this month, so that I have been able to prepare only a very hurried statement, which I have submitted to the Chairman.

3612. I have no doubt your evidence will be of great value to us. You have had a large experience of phonographs and gramophones?—Yes.

3613. You do not enter here upon pianos?—No, my Lord, only the talking machines.

3614. We have heard a great deal about this industry, and the merely formal matters are pretty familiar to us. I think your view is that the industry is about twenty years old?—About twenty years old.

3615. And that since its birth you say phonograph records have been made of the current popular music, so that the users of the phonograph have been kept in touch with various music publications as they came out?—Yes.

3616. Your view is that the phonograph business bears a closer analogy to the newspaper business than the music-publishers' business?—Yes.

3617. Why do you say that?—The phonograph business has developed along a very narrow line since its inception, and that line is the publication of current music as it comes out. Phonographs are sold very largely?—

3618. Are you including discs and rolls?—Discs and rolls—both; they are sold very largely to people in the rural districts, though the disc machines are probably more largely used in the large cities than the phonograph or the Edison machines. In developing along that line, we have been able to furnish our patrons with all the current music that comes out, and they expect to be still furnished with that music; so I feel that it is my creation of a new right—a new property right which is to be given to authors which does not now exist—the industry as it has developed ought to be interfered with as little as possible. Therefore it seemed to me that the Committee should recommend, if it saw fit, some plan such as the American system of compulsory licenses, giving the phonograph companies the same right to continue as they always have, by paying to the musical composers a fair royalty.

3619. May we take it that in America, as here before the passing of the American Act, the composers have not been recognized by this company?—That is true; neither by the companies nor by the Court.

3620. It must be by the law?—Yes, by the law.

3621. The American Act does propose to recognize them?—It proposes to grant this new right to them.

3622. You do not oppose the recognition of the composer's right to a compensation in some form?—No.

3623. But your point is, I understand from what you have said, that the situation ought not to be materially changed without considering the industries of the companies?—Yes, as they have developed, and only with the consent of the musical composers, but very largely they have impinged on us to use their music. They have contributed to the development that has taken place.

3624. Have you found in the States that publishers of music have come to you to have it developed in that way?—Very largely; we have received many requests from publishers to use their music, and before the Joint Committee in Washington I presented a large number of letters to us asking us to use their music.

3625. Is the impression you have formed that the sale of sheet music is or is not affected by the development of the phonograms?—Only because of those before. Personally, of course, I do not know whether it has been or not, but my impression is that we have helped the sale of sheet music. We have several letters. I remember one letter was received from a very large musical house in Chicago, Messrs. Lyon and Healy, who said they looked upon the phonograph as one of the best sources of advertisement, but I cannot say of my own knowledge whether it has done that or not.

L. present

3028. Do you draw the inference from those letters that it has helped the sale of sheet music?—Yes, that is my view.

3027. Now assuming you have a recognition of the composer's rights, how do you suggest that this subject of copyright both for the composer and the producers of the phonograph, should be fairly and properly dealt with?—Either by providing by the law that all phonograph manufacturers should have the right to use whatever copyrighted music they saw fit, upon the payment of a fixed and definite royalty, or by providing that the royalty should bear some proportion to the cost or selling price of the record, or by leaving the amount of the royalty to the Board of Trade, or to some body that could determine what would be a fair amount. I call attention in my statement to the fact that it has been proposed to make the royalty one penny a record, and I show that in the case of the Edison records, which retail for a shilling, a penny a record would be absolutely prohibitive, because those records cost us about 6d. and we sell them for 6d. In other words, our net manufacturer's profit is not 1s., but is only 1d., and a royalty of 1d. would simply amount to 100 per cent. on the manufacturer's net profit. It seems to me that the royalty ought to be a fair one, based on what the manufacturer makes. There ought to be some way of determining it.

3028. Then you do not accept the American Act as satisfactory?—It is not very satisfactory, but in America we sell the records for more than we do here; there we sell them for 35 cents, and here we sell them for 24 cents.

3029. You start with the view that a composer should have a recognition of his rights?—Yes.

3030. But that he should be obliged to grant a compulsory license?—In order that the industry should not be seriously affected.

3031. Do you see any objection to his making what agreements he chooses for that license?—Only, as I have pointed out, that if that were done it would be possible for one powerful company to practically monopolize music, evidence of which fact, I understand, has been that fact that the American law provided that there should be compulsory license, because it was then shown that the Aeolian Company in large company for the manufacture of perforated sheet music for pianolas) had already made contracts with more than 75 per cent. of the music publishers in America, providing that if the United States Courts decided in a certain way, then the Aeolian Company would be entitled to all that those publishers might issue for a number of years. It is evident that such a scheme could be easily carried out.

3032. You would then suggest a license to any manufacturer that chose to come forward?—Yes.

3033. So as to avoid a monopoly in one large concern?—Yes.

3034. Can you mention any other class of trade in which that applies?—In which that particular condition applies? I cannot except in the case of patents. The British Patent Act and the Canadian Patent Act both provide that under certain circumstances a manufacturer can use any patent and demand a compulsory license from the patentee; and, as I understand, in the country the amount of the royalty is to be fixed by the Board of Trade.

3035. (Mr. Gleyson.) That is under certain conditions?—Yes, if the patentee fails to work the thing himself.

3036. (Chairman.) Yes, there is no restriction, as far as I recollect the Act, on a particular patentee making a certain person his sole licensee?—Not at all.

3037. If he does not use it to the public advantage that is another matter. Is that the only case?—That is the only case I can think of, but it seems to me this is a very unusual case. We have developed along this line. The Committee is going to grant to the musical composers a new property right which they do not now possess. We have carried on our business in a perfectly lawful and legal manner, and now it seems to me as a practical question, while recognising the new right to be given to authors and recompensing them for their intellectual work, the commercial side of the question ought not to be lost sight of, and we ought to be allowed to continue, as we always have, along that particular line.

3638. You mean putting on phonograms anything as it comes along?—Yes.

3639. Paying the original author?—Is whatever is fair—whatever is right. It would be just the same as if the Committee recommended the passage of an Act which would take from the newspapers the right to publish items of news. The newspaper has developed along that line, and to do that would mean that the newspaper would have to go out of business in about a week; and if you take that right from us we should have to reorganize our business. We should have to use music where the copyright has expired, or employ people to write music for us; and I think since the Committee is recommending the granting of a new right, that these large industries which have developed under the protection of law ought to be protected and that a law ought not to be made specially harmful to them. It will be a very heavy tax any way.

3640. You would exempt the composer who had published his work at all to allow it to be used on the gramophones?—Either that or to do as they have done in America, to provide that the composer, if he wants to, shall have the right to prevent its being used at all, but if he has given the right to any manufacturer, then I think any other manufacturer should have the right to use it. Mr. Victor Herbert said he objected to some of his work being used on the gramophones; he thought it was not dignified. But if he wants it played on one, then all ought to have the same right. If he does not want it published, well and good.

3641. You mean on the machines?—Yes. If he thinks it undignified and does not want it published on talking-machines, he ought to have the right to say: it shall not be so published.

3642. Do you think it right that he should be restricted in his power to grant the right to the first manufacturer?—I think so in view of the special circumstances. If the law had always been broad enough to include talking-machines, and the talking-machine manufacturers had developed their industry along this line, then they would have done so at their own peril; but they have developed it lawfully and legally, and, as I say, at the direct request of many of these music publishers. Therefore it seems to me under those particular circumstances we have to meet the case in a particular way, and those interests ought to be protected.

3643. And you would not allow freedom of contract as to the amount of royalty?—No, if you do that it would be impossible to carry out the idea, because a music publisher might make a contract with one manufacturer giving a certain price with a secret rebate that could never be detected, and that price would be prohibitive to anybody else. It would be just as possible to make monopolies as it would be if there were nothing at all in that way.

3644. That would be only so in the case of deception?—Yes.

3645. (Mr. Astor.) If copyright is given in the production you may make on the gramophones or phonogram, you get a new right which you do not possess at present?—Yes.

3646. Would you have the compulsory license apply also to these new rights?—I have not considered that point, but I have no objection to that being done, if the Committee thinks it should be.

3647. If that is done, the Government or whoever decided the price would have to go into what was the proper figure to insure a compulsory license from disc to disc or film to film?—That is so.

3648. The United States legislature have passed law compelling the sale with a particular fixed royalty attached, have they not?—Yes.

3649. And as I understand, you say that that royalty is actually prohibitive to your business?—It would be in this country because, as I have said, our records are sold for less money in this country than in America.

3650. That would rather indicate that the legislature have not been very successful in fixing a price?—I think it was rather unscientific.

3651. Would not you have made a much better bargain yourself if you had been left to deal with the persons whose productions you were taking?—I am not able to say as to that. We were confronted with this particular menace in America.

3652. You would never make a bargain by which you had to give the composer 100 per cent of the profits?—No.

3653. And that is the figure you have put down as the amount that the legislature have fixed?—I am afraid my statement is not clear. We make more money in America by them than here.

3654. (Chairman.) You do not support a certain fixed royalty per disc, but you would prefer to leave it to a percentage?—I think that would be fairer, or, at least, something should be done to take into account the manufacturer's small profit.

3655. (Mr. Debs.) I was looking at the portion of your report: "These Edison records sell to the public for 1s., but they are sold to factors for 6d. The actual cost of the records, including the expenses of the artist employed, material used, making moulds, obtaining the copies therefrom, with advertising, selling, and other expenses is not far from 5d., so that a tax of 1d. per record would be equivalent to a tax of 100 per cent. on the manufacturer's profit."—Yes.

3656. Well, if you worked out the thing yourself, and were making an arrangement with a composer, you would not put a tax on so much as that?—No, it would mean if the tax were made a 1d. in this country we should be practically forced to leave the British field.

3657. (Chairman.) Might I exhaust the two alternatives? One is that there should be a percentage on sale values?—Yes.

3658. That would not necessarily work quite right, would it, because so much of it depends on the artist who writes into the phonograph?—I think there is a good deal in that.

3659. And if you take a percentage on the profits of the manufacturer it would be difficult to determine?—Yes, it is a very difficult question. You make a royalty of 1d. a record; that is our entire profit. A record that sells for 12s. could readily pay 1d., but yet that may contain the same musical composition as we have.

3660. Assuming that there is a new law on a fair basis recognizing the composer's rights, and recognizing your compulsory licence right, what do you think is the true and proper way of fixing the rate of the compulsory licence royalty?—Of course we always look out principally for our own interests. My idea would be to determine the net manufacturer's profit and make the tax something that the manufacturer could pay.

3661. That would be very inconvenient as a matter of investigation every time, would it not?—It would be very inconvenient if you had to investigate every record published; but I think you could investigate every type of record. For instance, we make cylinder records; we know what our direct expense is—that is the artist's expense—over the whole year.

3662. (Mr. Debs.) Would you have it a fixed sum on the disc, or have the manufacturer's books examined every year to see how much profit he had been making?—It is quite immaterial to me so long as the tax is one that would be fair to us. I do not see why a sliding scale would not be possible. A record selling for 1s., a small royalty; one for 2s., a little more; and 3s. and 4s. and so on, going up in a sliding scale.

3663. (Mr. Clayton.) Then you introduce a third party, the singer. It is the singer who enhances the value of the record?—Undoubtedly. I see the difficulties in the way of the Committee. We have a tax on one side which compared with the 1s. record is hardly to be mentioned, and yet compared with the 1s. record it is prohibitive; and on one record there may be exactly the same composition as there is on the other.

3664. (Chairman.) Assuming this change is made, do you advocate a protection to the manufacturer from the copying of his disc or roll?—I think that would be a fair thing to do. For example, we make records that will represent a small vendible artist. Two artists, a man and a woman, come on and give a little dialogue, and in preparing for that record we may work two or three days in interviewing those two artists, and after we have finished with it and made an artistic thing, as we think, they leave us and go down to one of our competitors and make the same record for them with all the knowledge and polish we have given them. We felt that was a particular hardship. We have done individual work.

—AND LAST, ADDRESS BY THE HON. CHAIRMAN.

3045. (Mr. Macmillan.) That is copyrighting individuals?

(Chairman.) That is not copyrighting your idea, but getting the artist to do it for another manufacturer.—Well, that is practically the same thing.

3046. It is one thing to prevent their copying your idea, and another to prevent them using the same materials?—Well, copying by direct transfer is, I think, more serious. I think that ought to be stopped.

3047. Can you say whether the American law has dealt with that?—It has not.

3048. It has not given any protection to the manufacturer?—No.

3049. Let him.—Left him to fight it out on the ground of unfair competition.

3050. (Mr. Edwards.) But it would be valuable if it were his?—It would be more valuable to the Gramophone Company who employ very expensive artists whose records, if copied, would be very valuable to a pirate.

3051. (Mr. Clayton.) And it would be a new right?—Yes.

3052. And as it is a new right you would not object to being in the position of having to grant a compulsory license to anybody else?—Well, I think as a matter of fairness, that ought to follow if we make that demand of the composer.

3053. If you grant a compulsory license to somebody else, would you take a fee for that license that you grant?—Yes.

3054. An agreed case?—Whatever is a fair amount.

3055. Would you share that with the composer?—Well, there are all questions I have not carefully considered.

3056. (Mr. Coffer.) It is quite on the surface.

(Mr. Clayton.) The composer must always be considered if you grant a compulsory license?—I am not prepared to admit that. I think the composer is being granted a new property right.

3057. (Mr. Edwards.) And you too, according to Mr. Clayton's question?—Yes, but I do not see why that should necessarily include others.

3058. (Mr. Williams.) May I suggest to you in the one case there is a business built up under the wings of the law and in the other there is not?—These are questions I have not considered.

3059. (Mr. Coffer.) I was going to ask you this; would you tell us how was the proposition first crystallized? How was the composer in America first excluded from all participation in the use of his works as musical instruments? Was it a Judge-made law as in England, or the construction of a particular clause in a Statute; or how did you come to it before the recent Act interfered with it—that the composer was nobody in the matter?—The business, of course, developed very slowly. In the very early days the sale of a dozen records was rather a large sale for a day; but as it developed and grew to large proportions an attempt was made by the composers against phonographic companies and against perforated roll companies to have the manufacturer enjoined from using his copyrights. The Courts determined that the American Statute covered only copies—gave them the right only in copies.

3060. That was following the English case?—Yes, they followed the *Boosey* case in this country.

3061. (Mr. Clayton.) That was Statute law?—Yes.

3062. Has it ever been fought out in America on the common law of the land?—I do not think so.

3063. The common law of America is the common law of England?—Yes.

3064. (Mr. Coffer.) Has it ever been suggested that the recent Statute is unconstitutional?—Yes, I have felt there is serious doubt as to the constitutionality of the new law. All our Federal laws are based on the Federal constitution, and that grants only to authors exclusive rights in their writings, and therefore the constitutional question arises whether or not these are writings. The constitution is not broad enough to include the granting of exclusive rights in intellectual works; it seems to be limited only to writings.

3065. (Chairman.) Are you speaking of the United States Constitution?—Yes.

3066. (Mr. Coffer.) Then I suppose the Act is working north?—It went into effect on July 1st, and we have sounded all the large publishers in America, who have

told us that they are perfectly willing that we should make use of any of their compositions upon payment of the prescribed royalty provided by the law.

3887. You speak of a number of letters from publishers requesting you to put their things on the phonograph?—Yes.

3888. Were those mostly American publishers?—They were entirely American publishers.

3889. What was the general character of the music those people published? Was it not mostly of an ephemeral character?—Yes.

3890. And all the composers like Stanford, Macdonald and Elgar would be left out entirely?—It was almost all ephemeral, the kind of music used in dance halls.

3891. But it is not uncommon for modern classical music to be put on the phonograph?—Yes, that is so.

3892. (Mr. Clayton.) Do you know of your own knowledge whether steps are not being taken in the United States to test this question of whether the new American law, in so far as it affects freedom of contract, is unconstitutional?—I have not heard that it has been.

3893. You do not know that?—No.

3894. (Chairman.) There is one point I have not asked you. I think the clause in the American Act making it payable on articles manufactured was a slip? It should have been on the quantities sold?—Yes, I think that is an error. The Act was passed through at the final stage of Congress.

3895. (Mr. Clayton.) But that point was raised and discussed?—What point?

3896. Whether it should be paid on the quantity manufactured or the quantity sold?—I do not recall that it was.

3897. Yes, I think it was?—I recall Mr. Currier, Chairman of the House Committee on Patents, sent me a copy of the proposed amendments several days before March 3rd, and I wrote to him immediately, and told him it was wrong, that we ought not to pay royalty on records manufactured, but only records sold, and he did not answer my letter till after the Bill had passed through Congress, and then he said it was too late.

3898. But it is not quite fair to say the present provision is so deficient. It is put in deliberately with a knowledge of the disadvantage attaching to it?—It may have been done deliberately, but not with knowledge of the effect.

3899. As to its consequences?—Yes.

3900. (Chairman.) You mean you may manufacture them and never sell them?—Yes, and then they are put in the money heap again sometimes.

3901. (Mr. Grenville Barker.) You said it was discovered that the Aeolian Company made arrangements with 75 per cent. of the publishers to give them all their works?—So I was informed.

3902. Is it possible that the publishers' contracts with the composers enabled them to do that?—I do not think there was any question about that. I do not recall now whether there were special contracts between the publisher and composer which provided for this, or if the contract was broad enough to include it.

3903. Had it anything to do with future publications?—Yes, of music published by them for 10 years I think.

3904. Then publishers were pressing on contracts which were not then made, in making that arrangement with the Aeolian Company?—Yes, understood these contracts were between the Aeolian Company and publishers. The publishers might lose all their clients and have no music to offer, but the contracts provided that such music as they did publish the Aeolian Company would have the right to.

3905. (Mr. Williams.) And I think it is clear that such music as they had published, the contract with the composer gave them the right to deal with?—Yes.

3906. (Mr. Grenville Barker.) I think that could not be so in England?

(Mr. Williams.) These contracts were based on litigation and not on legislation?—Yes, on the decision of the Supreme Court.

3907. (Mr. Grenville Barker.) In America, do some stores sell sheet music as well as phonograph records?—In some cases.

3908. Then it becomes practically one business?—No, not one business.

3709. (Chairman.) You really think unless some provision for license is provided that there is a serious danger of monopoly?—A very serious danger. I cannot emphasize that too strongly. It would be a very serious menace. The tax we have to pay will be hard enough. The phonograph business has passed the business days when large profits were made and records of ordinary artists could be sold for very high prices. It is a hard job business working on very close margins and it cannot stand much of a tax.

3710. You do not think it is safe to leave it open to competition with all the best manufacturers?—No, I do not think so.

3711. (Mr. Williams.)—You raise no objection to a payment of royalty?—No. We shall have to pay it, that is all. There is one statement I should like to make, and that is that we have received in this country letters also from publishers asking us to use their music, but I assumed that the Committee had had so many of those letters that it would not be necessary to bring any with me. I understand we have about twenty letters from publishers asking us to use their music.

3712. (Mr. Chapin.)—Not generally? Individual things?—Yes, I do not say universally.

3713. (Chairman.)—Is there any other point you would like to mention?—I should like to say in addition to the royalty being payable only on records sold, I think the proposed Act should take into account another factor in the business, which is, where records have been sold to dealers and are found to be unsalable, we have to take them back and allow full credit for them. We find that amounts to about 10 per cent. of our entire sales, and I suggest that the royalty should be payable monthly to the extent of 10 per cent. on what it would amount to, leaving it to adjustment at the end of the year, so as to take that into account.

3714. (Chairman.)—I think we ought to thank you very much for your evidence. It has brought things out very prominently. I do not say it has removed all our difficulties.

(Witness.) I am much obliged to you, my Lord.

**Legal Department Records
Phonograph - Correspondence**

Higham, Daniel

This folder contains correspondence and other documents relating to Daniel Higham's patents on mechanical amplification devices and to Edison's interest in his work. The selected documents cover the period 1902-1904. Among the correspondents are Higham, Edison, and their respective patent attorneys, John B. Moran and the firm of Dyer, Edmonds, and Dyer. Included is an option agreement between Higham's High-Am-O-Phone Co. and the National Phonograph Co., along with numerous items pertaining to the execution and disposition of the agreement.

Approximately 50 percent of the documents have been selected. The items not selected include printed patents, letters of transmittal and acknowledgment, and documents that duplicate information in selected material.

Mr. Edison:

Here is a letter from Moran. Will you please let me have the memo. that he refers to? I am also sending you copy of the proposed form of agreement. Please let me have your comments on this letter.

I am also attaching a letter from Dyer relating to the Higham patents.

Kindly look these over and send them back to me at your convenience, when I will write both parties.

1/2/03.

Enc-

W. E. Gilmore.

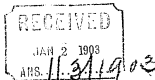
*Thank you about now
Moran paper is the offer for
have ~~great~~ patents that a meeting
of inventors, Higham, Moran, etc.
Pepper should take place
about 1st of next month
etc.*

[ENCLOSURE]

LAW OFFICE
JOHN B. MORAN,
20 Pemberton Square, Boston, Mass.
Telephone 1287, Haymarket.

Boston, Dec. 30, 1902. 190

Mr. W. E. Gilmore,
Edison Laboratory,
Orange, N. J.



Dear Sir,-

I find that you have included in your agreement mailed to me a few days since the Canadian Patent. In the conversation which took place between Mr. Edison, Mr. Higham and myself there was no talk whatever about the Canadian Patent. I am informed by Mr. Higham that in no talk which he had in my absence with either Mr. Edison or yourself was the Canadian Patent mentioned. Our talk was based entirely upon the United States patents. The United States patents are owned by the American Phonic Company. This company does not own the Canadian Patent or any other foreign patent. If you will examine the memorandum which is in Mr. Edison's possession in my handwriting, a copy of which in Mr. Edison's handwriting is in my possession, you will find that it has no reference to the Canadian Patent.

I notice also in your form of agreement that you make the payment three months from date, fourteen thousand dollars. By reference to the memorandum of agreement in Mr. Edison's possession you will find that there was to be one thousand dollars paid for the

*This is all correct -
but Chandler has always go together
- Patent, be there and in the case -*

[ENCLOSURE]

LAW OFFICE

JOHN B. MORAN,
20 Pemberton Square, Boston, Mass.
Telephone 1287, Haymarket.

Boston,-2-..... 190

option, the first payment thereafter was to be fifteen thousand dollars, and the balance fifteen thousand dollars to be paid in sixteen months.

Please confer with Mr. Edison about these matters, and using your blank form of agreement as a basis I will prepare a form of agreement satisfactory to us.

Respectfully yours,



[ENCLOSURE]

*Richard K. Rogers
Samuel C. Edwards
Frank L. Rogers*

*Law Office
Dyer, Edmunds & Dyer
Specialty Patents & Patent Counsel
31 Nassau Street
New York*

*Radio Address
"Science and Art"
Box No. 2290 New York*

William E. Gilmore, Esq.,
Presdt. National Phonograph Co.,
Orange, N. J.

RECEIVED
JAN 1 1903
ANS.....

Dear Sir,-

In accordance with your favor of the 26th inst., we have again carefully examined the two Higham patents, and have considered the possibility of reissuing them so as to secure additional reissued patents limited to talking machines.

Higham Patent No. 678,566.—In this patent the invention is illustrated in connection with a number of different uses: first, as a megaphone, to amplify spoken tones; second, as a megaphonic telephone transmitter, to amplify spoken tones and transmit them telephonically; third, as a megaphonic telephone receiver, to amplify the received tones; fourth, as a megaphonic phonograph recorder, to make amplified records; and fifth, as a megaphonic phonograph reproducer, to amplify the reproductions. In every instance, however, the same invention is present, the apparatus using a primary vibrating means, a secondary vibrating means, and an interposed frictional means. Under the law, patents are only reissued when they are invalid by reason of an insufficient or defective specification or some other equivalent error, as for instance when the claims are

[ENCLOSURE]

either too broad or else are so narrow as not to properly cover the invention. The law does not provide for reissuing patents in order that separate reissue patents may be secured covering the several uses to which a single invention may be applied, and even if such reissue patents were secured, we doubt if more than one would be valid, as they would amount practically to a number of patents covering the same invention. We therefore do not believe that this patent can be reissued, at least as Mr. Edison suggests. Of course if the claims are too broad, the patent could be reissued so as to properly narrow them, but that can be done at any time. It is only when the attempt is made to broaden claims by reissue that an inventor is required to be diligent in making his application for reissue.

In the draft of contract which we sent you, we did not bring out the point, which can be included in the papers when returned, namely, that any litigation under the patent relating to talking machines shall be under your charge, with the right on your part to use the name of the licensor as complainant in any suit for infringement. This, we think, would fully cover the point which Mr. Edison apparently has in mind.

Higham Patent No. 712,930.—We assume that this patent covers the specific arrangement used when the invention is employed for amplifying phonographic reproduction. The only arrangement illustrated and described is a phonograph, although the claims in terms are broad enough to in-

[ENCLOSURE]

clude either a megaphone or a telephone. The first claim of the patent is somewhat obscure, and on its face is capable of being read on the arrangement shown in figures 1 and 2 of Higham's patent No. 678,566. That claim, in our opinion, would only be valid when limited by implication to "elastic means independent of the primary vibrating means to increase the pressure". This fact might be utilized as a justification for securing a reissue of the patent. In such a reissue the original claims could not only be secured (the first being limited as above suggested), but additional claims could also be obtained limited to talking machines and covering the special arrangements, such as the floating weight, the adjustable independent spring, etc. If such a reissue patent would be desirable, we recommend that the attempt be made to obtain it.

In this connection we would like to have Mr. Edison's opinion as to whether the invention of the first Higham patent No. 678,566 is included in the apparatus disclosed in the second Higham patent No. 712,930. In the first patent the statement is made that—

"It is advisable that the coefficient of friction of the frictional contact upon the moving surface should not be much, if any, more than one, or, in other words, the frictional force set up by the moving surface should not be more, if any, than the pressure holding the parts in contact." (page 3 lines 10--16)

In order that such a relatively low coefficient of friction may be utilized, the patent emphasizes the necessity of employing lever means,—

[ENCLOSURE]

"whereby the frictional vibrating force can be increased as the ratio of the increased mechanical force of the lever means with a coefficient of one." (page 3 lines 34--37)

These limitations were introduced to distinguish the Higham construction from the construction of the Hope-Jones patent, in which we understand the friction shoe is pressed on the friction wheel by the direct vibrations of the primary means. Referring to the second patent, you will notice that the lever D is pivoted almost at its center, and we should therefore say that in this construction the coefficient of friction of the shoe L on the roller C was very much more than one, as defined in the first patent. If this is so, we doubt if the second patent embodies the invention of the first patent, and in that case it might be possible to re-issue the first patent so as to leave out the objectionable limitations to any specific coefficient of friction, and to distinguish from the Hope-Jones patent in some other way. If you will advise us what Mr. Edison's idea is on this point, we will again take up the patents should you desire it.

Yours very truly,

Alfred Edison & Alphonse

FID/AL

LAW OFFICE
JOHN B. MORAN,
20 Pemberton Square, Boston, Mass.
Telephone 1287, Haymarket.

Boston, Jan. 5, 1905 190

Mr. W. E. Gilmore,
Edison Laboratory,
Orange, N. J.

Dear Sir,-

Your letter of Jan. 3rd inst., at hand, in which you acknowledge the receipt of mine of the 30th december on January 2nd, and in which you also state that you supposed that Mr. Edison had given you all the facts in the case before you had the form of agreement drawn up but that he probably overlooked quite a few items, and in which you ask me to prepare a form of agreement as I understand it, and that you will then, on receipt of my form of agreement, take it up and arrange for a meeting of all parties in interest.

I assumed when we were talking with Mr. Edison that any proposition he discussed with us would be by him at some time submitted to the directors of the National Phonograph Company. As he was informed by us that Mr. Higham and I did not own the United States patents but that a company or corporation did, I assumed that he must have supposed that on that account the matter of agreement would have to be referred to the directors of our company.

In my last letter to you I stated to you what Mr. Higham and I supposed was the proposition which Mr. Edison made to us and which was to be submitted by us to the directors of our company. As we understood his proposition it did not include the Canadian patent but included merely the United States patents. The form of agreement which you sent us after having had

LAW OFFICE
JOHN B. MORAN,
20 Pemberton Square, Boston, Mass.
Telephone 1287, Haymarket.

Boston, -2- 190

your talk with Mr. Edison included both the United States and the Canadian.

Our corporation owns, as I informed you in my last letter, only the United States patents and has nothing whatever to do with the Canadian patent or any other foreign patents, and therefore it was utterly useless for me to have the directors meeting called of our company and submit to them the proposition which you embodied in the form of agreement, for as our company doesn't own the Canadian patent its directors cannot vote to comply with the terms of your form of agreement.

I assumed that after notifying you in my last letter that your form of agreement included the Canadian patent and that our company did not own the Canadian patent that you would follow the suggestion made by me and talk the matter over with Mr. Edison. I assumed that as a result of such talk with Mr. Edison that he would inform you that our views of the talk between himself, Mr. Higham and myself, were accurate, and that he would agree with our views that the Canadian patents were never talked over by us.

You ask us now to prepare a form of agreement as I understand it. I have already stated to you that Mr. Edison had in his possession in my handwriting a copy of his views which Mr. Higham and I were willing to submit to our directors, and which we believed we could induce the directors to adopt. Of course I know that preliminary talks between Mr. Higham, Mr. Edison and myself are not binding upon any corporations, for I assume that

LAW OFFICE.
JOHN B. MORAN,
20 Pemberton Square, Boston, Mass.
Telephone 1207, Haymarket.

Boston,-3-..... 190

the National Phonograph Company by vote of the directors has not authorized Mr. Edison to make any contract and I know that the American Phonic Company which owns our United States patents, has not authorized us to make any contract. The talks between Mr. Edison and myself were merely to get at a basis of arrangement which would be submitted to our respective corporations and in the hope that by those corporations they might be embodied in the form of contract.

The inclusion of or the exclusion of the Canadian patents is of vital consequence, for if Mr. Edison is unwilling to make us an offer for the United States patents alone the directors of the American Phonic Company can not do business with him. If on the other hand he is willing to make an offer to the American Phonic Company for the United States patents of one thousand dollars for a three-months option, fifteen thousand dollars to be paid at the end of three months on the signing of the contract by the companies, and fifteen thousand dollars in monthly instalments for a period of sixteen months from the signing of the contract, I will cause a meeting of the directors of the American Phonic Company to be immediately called, will lay Mr. Edison's proposition before them, and hope to be able to satisfy the directors, of whom Mr. Higham and I constitute a minority, that the proposition ought to be accepted.

Therefore for the purpose of facilitating matters I suggest that you or Mr. Edison send us in writing a proposition which I, upon receipt thereof, will submit to our Board of Directors.

LAW OFFICE
JOHN B. MORAN,
20 Pemberton Square, Boston, Mass.
Telephone 1287, Haymarket.

Boston,-4-..... 190

If they consider your proposition favorably I will advise the Board of Directors to authorize Mr. Higham and myself to sign the contract and to arrange all the minor details thereof. When this is done, by calling a meeting of the Board of Directors of the National Phonograph Company, by said company authorizing some person or persons to sign the contract, Mr. Higham and I, with such authority as I have indicated to be secured by us, with the persons authorized by your company will be able to sign a binding contract.

In referring in this letter to the purchase of the patents I refer not to the patents themselves but to a license to use our patented apparatus for talking machines only.

I refrain from drawing up a detailed form of contract embodying my own views because it might not be satisfactory to our Board of Directors, and I don't care to go to the trouble of calling a meeting of the Board of Directors and discussing the subject in detail until I have some reason to believe that our company and the National Phonograph Company can arrive at a reasonable basis for an agreement.

If it were not for the injection of the Canadian patents by yourself and Mr. Edison into the form of agreement which you sent us I would have had a meeting of our Directors before today, and probably would have had a favorable vote thereon, except as to one clause wherein you bind Mr. Higham to render personal advice etc. for a period of five years; and also would probably have had authority with Mr. Higham to meet the authorized agents of the National Phonograph Company to sign a binding contract.

The American Phonic company has no control over Mr.

LAW OFFICE.

JOHN B. MORAN,
20 Pemberton Square, Boston, Mass.
Telephone 1281, Haymarket.

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Boston, 190

Higham's personal services and any arrangement for his services would necessarily have to be made by the National Phonograph Company with Mr. Higham personally. I have no doubt satisfactory arrangements can be made with Mr. Higham personally in the event of the contract being made by the two companies. I doubt however that Mr. Higham would be willing to devote himself for the number of years indicated in your proposition to the service of the National Phonograph Company.

In addition to your proposition I have two others to submit to the Board of Directors at the Board's first meeting, but I desire personally to have yours submitted in its most favorable form.

I assume of course that Mr. Edison may be absent from the city and that you will be able to communicate with him inside of four or five days.

Truly yours,



[ATTACHMENT]

James -

Collins tells me graphophon Co
have a new speaker which you can hear
a mile off on the Hingham idea I guess -
perhaps we better write the following to
the Hingham people & let them send on
a draft that they will be satisfied
with & we can then change it -

If I remember right in your draft you ^{only}
did not ask for Higham services. But only
Essexmen to advise — 2

[ATTACHMENT]

Phone Co. —

~~It~~ We put in Canada for the reason
that it usually put in with the U.S. on
account of the market there being less than
Ohio a necessity of establishing a factory
there. Had it not been usual we would not
have mentioned it. Regarding Mr. Higham.
This is the first instance we believe on

2
Record where an inventor & large stockholder
in a Co. as he informed us, ~~he~~ would
not agree to give the purchaser of a license
his advice & experience over a reasonable period.
We did not ask for his services, that we
should expect to pay for — ~~that~~
~~if~~ If you will draw up a form of option
covering the points with the rights of reverses
therein to correct the patent in case of a
discovery we will consider it effectiveness &
return it with our comments.

[ATTACHMENT]

32
We have already found one reference which
will necessitate a revision to narrow the scope
of the patent.

Richard K. Byers
Samuel C. Edmunds,
Frank L. Byers

Law Offices
of
Dyer, Edmunds & Dyer
Specialty: Patents & Patent Causes.
31 Nassau Street

Cable Address
"Dyer, Edm & Dyer"
Tel. No. 2290 West

New York, January 8, 1903.

Thomas A. Edison, Esq.,
Orange, N.J.

G. Edmunds
where is the option

Dear Sir:-

We have again considered the Higham patents in view of your oral instructions last night.

First Higham Patent, No. 678,566.

The idea stated in this patent is to secure an amplification of sound vibrations by arranging a lever means between the brake-shoe and the primary vibrating means, so that the variations in the friction will be correspondingly greater than if the primary vibrating means actuated the friction shoe directly. The essence of the invention is the use of a lever means between the friction shoe and the primary vibrating means. If these lever means can be omitted, the patent will not be infringed, but apparently this cannot be done, since, as we understand it, the pull of a brake-shoe would be less than the pressure of the primary vibrating means if applied directly to the brake-shoe.

The first claim covers the invention very broadly, and is comprehensive enough to include the arrangement when used in connection with phonographs, telephones or megaphones.

The second claim covers the compounding idea, and although not limited in terms to lever means, this limitation

(T. A. E., 2)

must be implied in view of the specification.

We have not made an examination of the art, but know of no reference which anticipates the claims. In the case of pianophone attachments (Davis patent No. 546,582, September 17, 1895, copy enclosed), very slight movements of the contact fingers are amplified into much greater movements of the keys through the intermediation of a brake-shoe engaged magnetically with a revolving roller. In order that such an arrangement could be regarded as the equivalent of the construction of the first Higham patent, it would have to be held that the magnetic arrangement was the equivalent of lever means. We do not think this could be done, especially because with pianophones the friction shoe is not always in engagement with the roller, as with the Higham patents, while the vibrations dealt with are not sound vibrations. In other words, we believe that pianophones are not sufficiently suggestive of telephones, phonographs or megaphones to be effectively cited in anticipation of the Higham patent. Of course, you may find suggestions analogous to Higham's arrangement, dealing with sound vibrations, and in that case the Higham patent may not be valid and might have to be reissued so as to contain additional claims limited to phonographs. We should say, however, that in view of the utility of the Higham arrangement, and of the

(T. A. E., 3)

new and improved results secured, the patent will be looked upon as favorably as possible by the courts and its claims sustained unless clearly anticipated.

Second Higham Patent, No. 712,930, November 4, 1902.

Does this patent embody the invention of the first patent? We should say not, because the lever D seems to be pivoted substantially at its center, so that variations in friction due to the vibration of the reproducer I would be substantially the same as if the reproducer acted on the brake-shoe directly. If this arrangement is operative for amplifying sounds -- and the patent refers to it as "a more effective construction and combination of parts for the friction means" --, it is questionable whether the first patent brings out the essential features. It would appear from the second patent either that its construction was inoperative or else that the claim in the first patent to the great advantage of employing lever means was unfounded.

The first claim of the second patent, as we wrote Mr. Gilmore on December 31st last, is broad enough to be read on the first patent. If, therefore, the construction of the second patent is operative, there appears to be sufficient justification for reissuing this patent, in which event additional claims can be introduced covering phonographs.

In view of the second patent, we must say that the

(T. A. E., 4)

first patent does not stand out so conspicuously and clear-out as it apparently did at the time of its issue, and we think that before the option is exercised you should satisfy yourself beyond any question that the lever means between the primary vibrating means and the brake-shoe are absolutely necessary, or, what amounts to the same thing, that the construction of the second patent is less effective than that of the first patent. In fact, so far as the second patent is concerned, we do not see how, except in details, it can be distinguished from the construction of the Hope-Jones English patent.

Yours very truly,

Ayer Edmunds & Ayer

F.L.D./M.
Encl.

COPY.

In re Higham

Newark, N. J., May 17, 1903.

Wm. E. Gilmore, Esq.,
National Phonograph Co.,
Orange, N. J.

Dear Sir:

I have looked over the papers in the above matter carefully. The only way in which you can put a cloud on the title to the patents is to file a bill to compel an assignment of them in accordance with the proposition which they accepted, and then to file in the assignment department of the Patent Office a notice giving an abstract of the bill and a statement of the purposes of the suit. If any persons wishing to purchase the patents should have a search made he would then be put on inquiry as to the suit and your claim to the patents.

Yours truly,

(Signed) Howard W. Hayes.

[ATTACHMENT]

Show Hayes all papers
in Re Higgins, where
they accepted proposition
by telegraph & ask if
if he couldn't draw up
a paper showing it all
& file it in patent office
in assignment Division
so in future their patent
would have a
Cloud on Title

Σ

Newark, N.J., May 23-1903.

William E. Gilmore, Esq.,
Edison Manufacturing Co.
Orange, N. J.

Dear Sir:-

Referring to your favor of the 22nd inst. in regard to the Higham matter, I would say that of course any sort of statement or notice can be filed in the assignment division, but unless it appears from the statement that you are making some effort to enforce your rights, I fear it would have but little effect. However, if the purpose is merely to annoy the owners of the patents a little and possibly interfere with a sale of them, a general notice setting out the facts and stating your claim in the matter might have some effect. At least it would make a purchaser make inquiries of you before purchasing. If you say so, I will prepare such a statement and send it up to you for execution.

Yours truly,

HEN/BD.

W. E. GILMORE,
PRESIDENT & GENERAL MANAGER.

ADDRESS REPLY TO THIS COMMUNICATION TO ORANGE, N. J.

J. F. RANDOL,
SECRETARY & TREASURER.

NATIONAL PHONOGRAPHIC CO.

EDISON LABORATORY ORANGE, N. J.

OFFICE AND SALESROOM.

RECEIVED MAY 27 1903

PLEASE MENTION THESE INITIALS.

RECEIVED MAY 27 1903

EDISON LABORATORY

ORANGE, N. J.

CITY OF NEW YORK

Orange



RECEIVED MAY 26 1903

EDISON LABORATORY, 124 WALL STREET, NEW YORK, N. Y.

NEWARK, N. J.

NEWARK, N. J.

Howard W. Hayes, Esq.,

Newark, N. J.

MAY 26 1903

Dear Sir:

I have your favor of the 23rd, with further reference to the Higham matter. What you purpose doing is exactly what Mr. Edison thinks would be a good thing. In this connection he cited to me a case where he met something similar personally. Some years ago he gave a letter to a certain party covering some certain application or patent that was granted to him personally, and subsequently he was put to a great deal of expense and annoyance due to having written such a letter. He wants to try the same game on these people. He therefore thinks that a statement should be made up and sent to us for execution to be filed at the Patent office. On thinking the matter over further, however, do you not think it would be a good idea to see whether the patents that have been granted to Higham have been transferred recently, or since the date of the correspondence, as if so, then I doubt if a statement of any kind would amount to anything.

Yours very truly,

W. E. Gilmore

President.

WEG/IWW

DANIEL HIGHAM,
INVENTOR OF THE
"100-VOLT-ARC LAMP,"
AND THE
HIGH-AM-O-PHONE.

RETAINED ELECTRICAL ENGINEER
BY GENERAL ELECTRIC CO.

RESIDENCE: WINTHROP, MASS.
TEL. 84-B WINTHROP.

Winthrop Dec. 14th 1903

National Phonograph Co., -

Gentlemen:

The High-Am-O-Phone Co. accepts
your offer of eleven thousand dollars for the talking
machine rights of the High-Am-O-Phone Patents, \$1,000
for three months' option and \$10,000 cash.

You can draw up papers and send attorney here
or we will draw up and execute papers and go to
New York or Orange, as you prefer.

The assignment of these patents (two) from the
"American Phonoc Co." to the "High-Am-O-Phone Co."
is not recorded, so that in drawing up papers you
can provide for the seal of both companies - which
are organized under New Jersey laws.

MAIN OFFICE,
RECEIVED

DEC 15 1903

ANS.

Very respectfully,

Daniel Higham

January 7, 1904.

Mr. Daniel Higham,
Winthrop, Mass.

Dear Sir:-

Your favor of the 4th inst. has been received.

The triplicate copies of the option agreement were duly received and acknowledged by me on the 4th inst., and I have considered the changes proposed by you, and believe they will be satisfactory to my principals. The agreement will, therefore, be laid before Mr. Gilmore for execution.

I am advised by my Washington correspondents that the assignments sent by you for record, were not accompanied by the necessary fees. This matter should be attended to by you.

Yours very truly,

N.

I
No doubt remembered
January 14, 1904.
E

MEMORANDUM FOR MR. EDISON.

In reference to the search on the Higham patents,
Mr. Hatch reports that according to an article in "La Nature",
an American Engineer named Bataldua in 1897 submitted an idea to
you of transforming the Dussaud Microphonograph into an apparatus
similar to a Stethendoscope for magnifying heart and brain noises.
Do you remember any thing about this?

F.L.D.

M.

22393

574
OPTION AGREEMENT

Between

HIGH-AM-O-PHONE COMPANY.
NATIONAL PHONOGRAPH COMPANY
and
DANIEL HIGHAM.

DATED *Jan. 22. 1904*

K/2
U. S. PATENT OFFICE
FEB 2 1904
RECORDED

*P. L. Your Secy
Orange, N. J.*

Fee #3 - 2/2

2-392.

D
1904

Phon. -
Agreements

RECEIVED for record Feb. 2, 1904 and recorded in

Vol. M 68, page 454, of Transfers of Patents.

IN TESTIMONY WHEREOF I have caused the seal of the
Patent Office to be hereunto affixed.

1904 Dec 17-52

R. I. Allen
Commissioner of Patents.
676

OPTION AGREEMENT.

AGREEMENT made this 22 day of *January*
A. D. Nineteen hundred and four, Between -

HIGH-AM-O-PHONE COMPANY

a corporation organized and existing under the laws of
the State of New Jersey, party of the first part; and

NATIONAL PHONOGRAPH COMPANY

a corporation organized and existing under the laws of
the State of New Jersey, party of the second part; and

DANIEL HIGHAM

residing at Winthrop, County of Suffolk and State of
Massachusetts, party of the third part, WITNESSETH:

here WHEREAS the party of the first part is the
owner of certain inventions relating to phonic appara-
tus and sound reproducing apparatus covered by United
States Letters Patent No. 678,566 granted July 16, 1901,
to Daniel Higham, party of the third part, and No. 712,930
granted to said Daniel Higham November 4, 1902; and

WHEREAS the party of the second part is de-
sirous of securing an option to purchase the exclusive
right to make, use and sell the said inventions, or any
improvements thereon the use of which would constitute an
infringement of both or either of said patents, which
may be acquired by the party of the first part, or which
may be made or acquired by the party of the third part,

O B J E C T I V E Y O U R S E L F E N D I *

NOW, THEREFORE, it is agreed as follows:

1. The party of the first part, for and in consideration of the sum of One Thousand Dollars (\$1000) to it in hand paid by the party of the second part, receipt of which is hereby acknowledged, covenants and agrees that it will sell, assign and convey to the party of the second part, its successors and assigns, upon the terms hereinafter stated and at any time prior to May 31, 1904, the exclusive right and license to make, sell and use the inventions covered by said Letters Patent in and throughout the United States of America for talking machines only (but not for telephones or wireless telephones or telegraph machines), whether employing cylindrical or disk records or records of any kind, together with the same rights in any improvements on said inventions, the use of which improvements would constitute an infringement of said patents or of either of them, which the party of the first part may now own or hereafter acquire during the life of said patents.

11. That, if in the opinion of counsel of the party of the second part the patent or patents should be re-issued with such new claims and will in his opinion be more desirable for the purpose of litigation, the said party of the first part will arrange for such re-issue at the expense of the party of the second part, providing such new claims as may be proposed will not affect the patent rights herein-

...tion of the name of one ... (27000) to be in
... and ... of the title ... to be ...
... "INVENTION" is to ... as follows:

... ..

... ..
... ..
... ..
... ..

reserved by the party of the first part, its successors and assigns; and the party of the third part, for and in consideration of the agreement aforesaid, hereby covenants and agrees to give all possible assistance, but without expense to himself, to the party of the second part in the matter of such re-issue or re-issues if necessary, to sign any documents which may be lawfully necessary for that purpose, and to assign, without further consideration than that expressed in clause one and five of this agreement, to the party of the second part the exclusive right and license to make, sell and use in and throughout the United States of America during the time covered by said letters patent or any re-issue of them, for talking machines only, (not including telephones, wireless telephone and telegraph machines,) whether employing cylindrical or disk records or records of any kind, all such improvements on said patented inventions as would if used constitute an infringement on said patents, which the party of the third part now owns or may hereafter acquire during the life of said patents:

111. That the party of the second part shall have the right to litigate the patents as already issued or any re-issue of same, so far as they pertain to talking machines only, and in that case such measures shall be taken by the party of the first part that the title to said patent or patents or any re-issues of same shall be so placed that the said party of the second part can conduct any and all such litigations; and the party of the first part further agrees that they will aid the said party of the second part in every way by signing all necessary papers, documents, etc., as may be required for the furtherance of such litigation: The expense of such litigation shall be borne entirely by the party of the second part and the party of the first part

the party of the first part shall be required to sign any papers or take any action rendering it liable to expense or injury to its reserved rights in said patents except such possible injury as is incidental to litigation of the talking machine rights and except such expense as shall be satisfactorily guaranteed to said party of the first part by said party of the second part.

shall not be required to sign any papers or take any action rendering it liable to expense or injury to its reserved rights in said patents except such possible injury as is incidental to litigation of the talking machine rights and except such expense as shall be satisfactorily guaranteed to said party of the first part by said party of the second part.

IV. That for a period not to exceed five years from the date of this contract, the party of the third part shall personally, without expense or undue inconvenience to himself, give to the party of the second part his advice and knowledge relating to the practical part of the said invention so that the said party of the second part shall be enabled to more fully perfect and introduce the invention covered by said patents or any re-issues of same in a commercial manner.

V. If the party of the second part elects to exercise its said option, it will pay to the party of the first part, on or before May 1, 1904, the sum of Ten Thousand Dollars (\$10,000) in cash.

VI. If and when the party of the second part elects to exercise said option, then upon the payment of the sum of Ten Thousand Dollars (\$10,000) in cash hereinbefore provided, the party of the first part will execute and deliver to the party of the second part a license agreement to the party of the second part conveying the rights hereinbefore stated.

IN WITNESS WHEREOF the parties hereto

the order of this conference, the order of the ruling body
IA. This for a further not to exceed the same time

second half.

and to meet half of the other half of the half of the
and except such expenses as shall be necessary for the
in the interest of the institution of the ruling body
before the time in the future except such expenses as shall
tion therefore it is the order of the ruling body to the la-
shall not be required to make such expenses as shall be

have caused these presents to be properly executed in
triplicate this 22 day of January 1904.

RECORDED
INDEXED

In presence of

M. A. Murphy
James E. Beeny

at
J. B. Randolph
Secretary

John C. Plam
John C. Plam
Randall H. Hephorn

Randall H. Hephorn
National Phonograph Company
John C. Plam
J. B. Randolph
President

February 1, 1904

Honorable Commissioner of Patents,
Washington, D. C.

Sir:--

I hand you herewith a license agreement dated January 22, 1904 between High-Am-O-Phone Company, National Phonograph Company and Daniel Higham.

Kindly have this assignment recorded and return the same to me, charging the cost thereof to my account.

Very respectfully,

FLD/AM.
(Enclosure)

High-Am-G-Phone Patents.

February 1, 1904

Mr. Daniel Higham,
Winthrop, Mass.

Dear Sir:-

I have brought to Mr. Gilmore's attention the option agreement and he has executed it on behalf of the National Phonograph Company. Enclosed I beg to hand you two of the copies, the original being retained for our own use. I also hand you check for \$1000.00, the consideration for which the option is granted, and of which you will please acknowledge receipt.

Yours very truly,

FLD/MM.
(3 Enclosures)

Higham patents.

April 15, 1904.

W.E. Gilmore, Esq.

c/o National Phonograph Co. Ltd.,

25 Clerkinwell Road,

London, E.C. England.

Dear Mr. Gilmore:-

In reference to the Higham patents, I enclose an opinion which I have submitted today to Mr. Edison, recommending that nothing be done towards purchasing them. The patents are in my opinion invalid, and there is nothing to prevent Mr. Edison from getting up a device for accomplishing the same purpose without danger of legal complications. Mr. Edison agrees with this view, and we will therefore, do nothing towards exercising the option unless you cable me to the contrary. The option expires on May first.

Yours very truly,

FLD/ARK.

Telegrams & Cables: "RANDOLPH, LONDON."
Telephone No. 5050, HOLBORN.

TRADE
Thomas A Edison

Cable Codes: T.A.E., A.E.C., COMMERCIAL,
LIEBKE'S, AND HUNTING'S.

**Thomas A.
EDISON'S**

Phonographs,
Cello Moulded
Records,
Projecting
Kinetoscopes,
Original Films,
Battery Fan
Motors,
Edison-Primary
Batteries,
Bates and Edison Automatic Hand
Numbering Machines.

MARK
EUROPEAN HEADQUARTERS
OF THE

**NATIONAL PHONOGRAPH GO. Ltd.
EDISON MANUFACTURING GO. Ltd.**

25 Clerkenwell Road,

London, E.C.

FACTORIES:
Orange N.J.,
U.S.A.
Berlin.
Paris.
Brussels.

25th April, 1904.



Frank L. Dyer, Esq.,
C/o Edison Laboratory,
Orange, New Jersey.

Dear Mr. Dyer,

I am in receipt of your letter of the 15th, enclosing copy of your Opinion, dated April 12th, to Mr. Edison, relative to the Higham patents, and in a cable which I sent through our New York office to-day I advised you that I approved dropping the purchase of these patents. The report that you have made is very full and complete, and as you know I have all along thought that in purchasing these patents we were making a mistake, as it was a grave question as to whether the patents could be sustained as against others, and the opinion that you have written fully confirms my views on the matter. I presume that you will have written Mr. Higham, or his representative, that we do not care to purchase same.

Yours very truly,
NATIONAL PHONOGRAPH COMPANY,

W. E. Dyer
President.

W.E.G./L.D.

May 6, 1904

W. F. Gilmore, Esq.,
National Phonograph Co., Ltd.,
25 Clerkenwell Road, E.C.4, London.

Dear Mr. Gilmore:-

Your favor of the 25th ult. has been received, and I am glad that my views on the Higham matter coincide with your own.

I wrote Mr. Higham that we did not care to exercise the option, as soon as your cablegram came to hand.

You will be glad to hear that I have succeeded in opening up the Columbia territory in Washington and Maryland. As soon as the Court ordered Mauro to go ahead with the cases he gave up, and I am sending orders to-night to have the suits discontinued.

Yours very truly,

F.L.D./SM.

1st an improvement made by Higginson
during life of patent.

2nd ~~That~~ That if on the expiration
of the patent letters of the
Natl that the patent
patents shall be renewed
~~with such~~ new claims ~~which~~ as
will in their improvement be
more desirable for the purpose
of litigation, that the
said Higginson & Co
shall authorize the Natl
Co to make such
renewal - ~~the~~

3 That the Natl Co shall
have the right to litigate
the patent so far as they

pertain to ~~fixing~~ ^{fixing} ~~the~~ ^{Higginson}
+ such renewal shall
be taken that the title
of patents shall
be placed so that the
Natl Can conduct
such litigation -

4 That Higginson & Co
will use in every
way by signing papers
etc to further such
litigation.

3.

that for a period of 5
years, Messrs. Hughes
personally shall give
to the Natl Co the
benefit of his advice
& experience relating
to the practical part
of the said invention
that the Natl may be
enabled more to perfect
more fully to perfect
& introduce the invention

[Signature]

Dyer -

Can Hyman patents
be reissued so that they
can be divided into

~~2~~ 2 or more patents

The extra patents Related

Entirely to phonographs

+ with different claims

in my opinion the claims

are too broad + in view

of the auto piano movements

2

Could not be sustained

{

**Legal Department Records
Phonograph - Correspondence**

200-Thread Record

This folder contains correspondence and other documents relating to Edison's efforts to obtain American and foreign patents for his 200-thread record, which he manufactured as the "Amberol" record. The selected documents cover the period 1908-1910. Among the correspondents are Edison, Frank L. Dyer and Dyer Smith of the Legal Department, inventor Ademor N. Petit, and British patent agents Marks & Clerk. Included are affidavits by Edison and Smith regarding the development of the longer-playing record, as well as correspondence concerning claims by the Premier Manufacturing Co., Ltd., of Great Britain to have made similar records.

Approximately 10 percent of the documents have been selected. The items not selected include printed material, detectives' reports, correspondence, and other documents collected for a proposed suit against the Premier Manufacturing Co.

F 281 0

July 31, 1908.

Mr. Dyer Smith:-

Here is a memorandum with Mr. Edison's note thereon in reference to the foreign patents on the new 200-thread record. These applications are of the highest importance and every effort must be made to obtain adequate claims.

FLD/ARK.

F.L.D. Dyer.
NY

[ENCLOSURE]

Mr. Edison:

Dyer

7/23/08.

In reference to foreign patents on the new 200-thread record, I find that applications were filed on December 31, 1907, in England, Germany, France, Belgium, Austria and Hungary. So far the French and Belgian patents have been granted. The German and Austrian applications have been rejected and I expect that there will be difficulty in getting the patents, because in these countries the patent offices are strictly technical. The Hungarian application has not yet been reached for action, but I do not expect trouble. The British application has been rejected, but I think the patent will eventually be granted.

FLD/IWW

F. L. D.

*You better fight hard in Germany
& England like the storage battery
patent. If we keep fighting we probably
will win out*

REFER TO THIS NUMBER
IN YOUR REPLY

1031

1281
MEMORANDUM

FRANK L. DYER,
ORANGE, N. J.

Mr. Dyer Smith:

12/5/09.

In reference to the application on 200-thread machine, Mr. Edison told me to-day that when he first experimented with the invention he made the recorder one-half the diameter of the 100-thread recorder and that it was not until he had laid his plan out on a scale one thousand times enlarged that he ascertained why it was that the records were so faint. I think it would add a great deal to the application if you filed an affidavit of Mr. Edison detailing his experiences along with the other affidavits. We want to push this case through as soon as possible.

FLD/IWW

F. L. D.

to

Wick & C.
Press
Schen

Dec. 6, 1909

Messrs. Marks & Clerk,
57 & 58 Lincoln's Inn Fields,
London, W. C., England.

Dear Sirs:

We have an application for patent in the United States Patent Office on Mr. Edison's 200 thread record as an article of manufacture. The application stands under final rejection, but the Examiner has stated that he will reconsider his action if we can produce certain affidavits which would tend to indicate invention by showing that the invention had been vainly sought by Mr. Edison and other inventors for a long time, prior devices all being unsuccessful because the principle on which our present successful 200 thread record is made was not understood. I would like to have you, if possible, secure an affidavit as to the efforts of the Premier Manufacturing Company, Limited, of The Point, Wandsworth, London, S.W., to put out a four or five minute cylinder record.

As you doubtless remember, our Standard 100 thread record is cut with a circular groove by a recorder having a

M&C #2

diameter of .04 of an inch. To cut 200 threads to the inch, the obvious thing seemed to be to use a recorder of one-half the diameter of the former one, that is to say, .02 of an inch. This was Mr. Edison's idea for a good many years in experiments which he conducted from time to time, but the resulting records were always too faint to be practical except when reproduced through hearing tubes. However, he finally discovered that the 200 thread record should be cut with a recorder having a diameter not one-half, but one-quarter that of the recorder for the 100 thread record, this resulting in the formation of a record groove having the same depth as the 100 thread record groove, but having a ratio between the width and depth of the cut only one-half of that in the case of the 100 thread record. That is to say, in the case of the 100 thread record the maximum width of the groove is about sixteen times its maximum depth, while in the case of the 200 thread record the maximum width is only about eight times its maximum depth, the cut being approximately circular in each case. Accordingly, we have claimed in the United States application substantially a duplicate sound record made of a hard tough material whose record groove is substantially circular in cross section, has approximately 200 threads per inch, and is of a depth which is greater than one-tenth of its width, or which is of a depth approximately one-eighth of its width.

WAC #3

In talking to Mr. Edison a number of months ago, he stated that he understood the Premier Company had put out a four or five minute Clarion cylinder record, which he thought had been formed on the idea of using a recorder only half the diameter of the 100 thread recorder instead of using one which was one-quarter the diameter as in our case, and that because of the lack of comprehension of this principle, the resulting record was so poor and faint that it was unsuccessful and had to be taken off the market. Of course, if I can submit an affidavit showing these facts in connection with an affidavit showing Mr. Edison's unsuccessful experiments, they will be very useful.

I have a circular of the Premier Company dated April, 1909, advertising the Ebonoid five minute cylindrical record, and I see from the Trades Journal that they are still advertising this record. Therefore, I do not know whether they ever took the record off the market as Mr. Edison seemed to think, or not. Also, I have one of their records here, which I have played, and which seems to be quite good and loud. I am now having it examined to find the ratio between the width and depth of its groove. In view of these facts, I do not know whether Mr. Edison was mistaken as to their record or not. Of course, it may be that they first put on the market a poor rec-

M&C #4

ord made as described by Mr. Edison and had to take it off, and then found the correct principle and put a record made in accordance with it on the market. I wish you would have an investigation made as to these matters, and if you are able to find anything which will be of help to us, have an affidavit made and sent to us. I suppose some of the men at the National Phonograph Company, Limited, can help you. Of course, we are very anxious to obtain a patent on this invention, if possible, in view of the fact that some of our competitors have just put a four minute record on the market in this country and are reaping the benefit of our extensive advertising of our Amberol record.

Hoping to hear from you soon, I am

Yours very truly,

DS/JS

Mr. ~~Roger~~ Smith:-

I have examined carefully under the microscope the Ebonoid record made by the Premair Manufacturing Co, and as far as I can see their recording stylus is as small as our own, in fact, it looks to me as if it was smaller.

W. H. Miller.

12-9-09.

W. H. Miller

F281

Feb. 24, 1910.

Messrs. Marks & Clerk,
57 & 58 Lincoln's Inn Fields,
London, W. C., England.

Gentlemen:

I have received your favor of February 10th re five minute records. I note that you state that you have discovered that the Premier Company made no 200 thread records until early in 1909, and that in view of this, you have discontinued your inquiries. You also state that in the circular issued by the Premier Company November 4, 1908, they stated in the last paragraph but one that "As they had not at that time produced any 200 thread records, they intended to do so and intended to show these samples to their customers shortly after the issuance of this circular."

Apparently, I do not have this circular, and do not quite understand the situation. You sent me with other circulars of the Premier Company, a typewritten page stated to be a verbatim copy of the Premier Company's circular letter sent to the trade November, 1908. I do not know whether this was the circular referred to by you as issued November 4, 1908, or

M&C #2

not. In this copy, however, it is stated "We are sending under separate cover a test record of the new 200 thread cylinder record", and following are instructions as to the manner by which the best results can be obtained from the test record in connection with the sapphire point, which they state they are sending along with the record. Am I to understand that you have concluded that although the Premier Company state that they are sending these test records under separate cover, that they never did actually send out the same?

I would be glad to have you send me the original of the circular from which I quoted, and also an original of the circular of November 4, 1908, if that is different from the above.

The situation is as follows: - The Primary Examiner of the United States Patent Office finally rejected the ^{on April 2, 1909} claims of Mr. Edison's application upon the 200 thread record as an article of manufacture, upon the ground of non-invention. He has stated to me personally, however, that he would reopen the case and give us a rehearing if I produced affidavits showing that Mr. Edison and other inventors and manufacturers had endeavored unsuccessfully during a considerable period to obtain a commercial four-minute record, and that they had not been successful because they had not realized the relation between depth and width of the record groove necessary to ob-

M&C #3

tain the proper volume of sound in reproducing from such a record. I have such an affidavit signed by Mr. Edison as to his unsuccessful efforts, and would like an affidavit as to the Premier Company's efforts. The Premier Company confesses in their circular of February, 1909 that up to that time they had experienced various drawbacks and difficulties in the making of such a record. They stated that one of the difficulties had been the making of a record of this character having sufficient volume. Of course, the inference from this is that they had experienced the same difficulties as Mr. Edison and had not realized that to obtain a 200 thread record made with a circular recorder, the latter should be approximately one-quarter the diameter of the recorder used in making the 100 thread record, instead of one-half the diameter of the latter, as it always seemed to Mr. Edison it should be during the period of his unsuccessful efforts to produce the 200 thread record. This inference, however, is not definite proof of this fact. Our case would be much stronger if we could produce one of the test records referred to by the Premier Company in their circular of November, 1908, a copy of which you sent me and from which I have quoted, this test record being one in which the groove was cut by a recorder approximately .02 inch in diameter, if that is the case. If we cannot

M&O #4

obtain such a record, the proof would be equally definite if we could obtain an affidavit from some one familiar with the efforts of the Premier Company during their experimental stage previous to January or February, 1909, stating that the difficulties which they were not enabled to overcome for some time were as indicated above. Is it not possible for you to obtain information from some one who worked for the Premier Company at that time and was familiar with their endeavors? The claims of our application are limited to a record, the groove of which is approximately circular or elliptical in cross section, is of a pitch materially finer than 100 threads per inch or specifically, approximately 200 threads per inch, the maximum depth of the groove being greater than one-tenth of its width or specifically, approximately one-eighth of its width, the maximum depth of the groove also being approximately .001 inch or less. The actual maximum depth of the groove in our 200 thread record is about .00065, and with such a depth the proportions have to be about as stated when the recording stylus has a diameter of about .01 inch. Our recording stylus for the 100 thread record has a diameter of about .04 inch, or four times the diameter of the recorder for the 200 thread record, and records made by this recorder having the same depth as the 200 thread records have a width twice as great, so that with them the depth of the groove is less than one-

M&C #5

tenth of its width, or approximately one-sixteenth of the width. If you can obtain any information along the lines indicated, it will be of great help. If you are not able to get such information, kindly have prepared an affidavit executed by one of yourselves, setting forth the best facts in your possession which will bear upon the matter.

Yours very truly,

DS/S

IN THE UNITED STATES PATENT OFFICE.

THOMAS A. EDISON)	
SOUND RECORDS)	
Filed January 3, 1907)	Room No. 379
Serial No. 350,646)	

HONORABLE COMMISSIONER OF PATENTS.

S I R :

In connection with the above entitled application, applicant's attorney on March 23rd, 1910, sent the following telegram to Examiner J. T. Newton, Division 23, U. S. Patent Office: "Will you grant rehearing Edison application 350,646 on Friday? Have new evidence invention. If not Friday, some date before April 2. Wire reply collect. Frank L. Dyer." The same day the following reply was received:

"Frank L. Dyer,
Edison Laboratory,
Orange, N. J.

Will grant rehearing on Edison
application Friday"
J. T. Newton."

Accordingly, on Friday, March 25, applicant's attorney interviewed Examiner Newton and had the desired rehearing in connection with the rejection of the claims of the said application. Applicant's attorney submitted to the Examiner the following papers, which were accepted and admitted to the file: 1st: an amendment of various formal matters intended to clear up various clerical errors and to add to the clearness of the specification; 2nd: affidavits of Thomas A. Edison, Charles N. Wurth and Dyer Smith; 3rd: various papers filed as exhibits in connection with the affidavit of Dyer Smith.

The affidavits and exhibits were intended to show invention and patentability of the subject matter of the application from the fact that, first, the invention was of great commercial importance, and secondly, that it had been unsuccessfully sought by Mr. Edison and other inventors through a long term of years during much of which time most of the patents cited by the Examiner as references were known. The affidavits show the difficulties which had to be overcome, and they show that apparently the same difficulties were met by an English Company facing the same problem and were not overcome by this company for a term of several months even with the aid of the sound record then manufactured by Mr. Edison and embodying a reduction to practice of the invention claimed in this application. The affidavits also show that no other inventors or manufacturers had apparently realized the invention before Mr. Edison.

In connection with this data various authorities were cited by applicant's attorney to the effect that in judging of invention in case of doubt regard may properly be had to the efforts of other inventors in the same field particularly where there are not a few both before and since, as well as to the difficulties to be overcome and the success of the device, where in the number and quality of the articles produced it has been marked. There are many such decisions and the principle is well recognized. Among them may be noted Novelty Glass Manufacturing Company, vs. Brookfield, 170 F. 945, 953; Ex parte Eastwood, 144 O. G. 119; Mitchell, et al, 15 Gour, 25-23 March 19, 03; Ex parte Thomson, 120 O. G., 2756. Also the recent case of General Electric Company vs. Hill-Wright Electric Company, 174 F. R. 996.

As well stated in the last citation " the fact that the invention is simple and that at the present time it seems that it might have been obvious to the workers in this art, does not militate against its validity. Many of the most useful inventions depend upon equally simple changes. The important question is - what does the invention do?"

It is thought that it has been shown that this invention has done what has never been done before, namely: made a commercially practical 200-thread sound record the manufacture of which has now become a tremendous industry, hundreds of thousands of these records known as the "Amberol" records being manufactured and sold by the National Phonograph Company alone every month.

The discussion of the references and the general questions of patentability connected with this invention appear of record in applicant's various amendments, and were further gone over on the rehearing before the Examiner and need not now be rehearsed. It need only be noted that in a sound record having 200-threads to the inch, the article formed is so exceedingly microscopic as to the details of the record undulations that it is always extremely difficult to discover and fully appreciate the exact difficulties which prevent success, and it was therefore possible for applicant and his assistants to labor on the question involved for many years without realizing the conditions which finally being realized resulted in the remedy involved in the present invention.

Respectfully submitted.

THOMAS A. EDISON
by

Orange, New Jersey
March 29 1910

His Attorney

[ATTACHMENT]

IN THE UNITED STATES PATENT OFFICE

Thomas A. Edison :
SOUND RECORD :
Filed January 3, 1907 : Room No. 379.
Serial No. 350,646 :

State of New Jersey)
County of Essex) ss.

THOMAS A. EDISON, being duly sworn, deposes and says as follows: I am of mature age, reside at Llewellyn Park, Orange, Essex County, New Jersey, and am the same Thomas A. Edison who filed application Serial No. 350,646 on January 3, 1907. The said application describes and claims a sound record as a new article of manufacture, this record being formed of a hard tough material having a record groove which is substantially circular in cross section, and having approximately 200 threads per inch, the maximum depth of the groove being greater than one tenth of its width, or specifically, about one eighth of its width when the record has 200 threads per inch and the groove has a maximum depth of approximately .0006 of an inch. As I have stated in my application, a sound record such as that just described is formed by the use of a recording

[ATTACHMENT]

stylus having a diameter only about one fourth the diameter of the stylus which is regularly used for making the 100 thread record. As I state in my application, this results in a record which may be reproduced with the requisite loudness and with great clearness. The invention which my application describes and claims was the successful culmination of a great many years of experimenting on the part of myself and my assistants.

My attempts to make a successful 200 thread record date back to the early nineties. One thousand phonographs intended to reproduce from records having 200 threads to the inch were made under my direction and shipped to England for the Edison-Bell Company between May and August, 1893. The records which these phonographs played were cut by a stylus having a cutting edge .020 of an inch in diameter. That is to say, the stylus was just about half the size of the recording stylus used in making 100 thread records, since it seemed obvious that a record having 200 threads per inch should be cut by a stylus one half the size of that used in making records having 100 threads per inch. The records so made and reproduced on these machines sent to England were considerably weaker than the 100 thread records, so that they could only be heard by the use of hearing tubes. I now attribute the weakness of the sound reproduced from these records chiefly to the fact that I did not then realize that the recording stylus should be one quarter instead of one half the diameter of the recording stylus used on the 100 thread record. Five hundred more of these machines for playing 200 thread records were shipped to England for the Edison-Bell Company

[ATTACHMENT]

from January, 1895 to May, 1896. The records for this lot of machines were made by the use of the same sized stylus as the first lot of these records, and were not loud enough to be heard except by the use of hearing tubes. This attempt to make a 200 thread record was considered unsuccessful and no other machines of this type were made commercially.

A number of my assistants experimented at intervals for a great many years under my direction in the endeavor to make a commercially successful 200 thread sound record, and particularly one which would be sufficiently loud to reproduce with a horn. In none of the experiments, however, was it realized that the cutting stylus should be reduced in the proportion described in my application. Charles N. Wurth, one of my assistants, made such experiments at intervals for about ten years up until possibly 1901. All of the 200 thread records made by him were formed by a stylus of approximately .020 to .025 of an inch in diameter. He also made under my direction some 400 thread records. The first of these was made in July, 1895 with a stylus having a diameter of .010 inch. Other 400 thread records were made by Mr. Wurth with a stylus having a diameter of .009 or .008 of an inch.

Finally, after all these unsuccessful experiments, I hit upon the correct way to make a 200 thread record, Mr. Walter H. Miller helping me. This was, I think, in 1905 or 1906. As the result of experimenting and the making of wooden models and charts upon an enlarged scale showing the sound record as made under different

[ATTACHMENT]

conditions, I determined that the 200 thread record should be cut with a stylus of .010 of an inch in diameter or thereabout, as described in my application. This invention resulted in the manufacture of the well known Amberol record having 200 threads per inch by the National Phonograph Company. A very large business is done in the manufacture and sale of these records.

Sworn to and subscribed before me
this 5th day of January, 1910.

[ATTACHMENT]

IN THE UNITED STATES PATENT OFFICE

Thomas A. Edison :
SOUND RECORD : Room No. 379.
Filed January 3, 1907 :
Serial No. 350,646 :
:

State of New Jersey)
: ss.
County of Essex)

DYER SMITH, being duly sworn,
deposes and says as follows:

I am of mature age, reside at Montclair, New Jersey, and am a Bachelor of Laws and patent attorney in the Legal Department of Thomas A. Edison. Some time in 1909, I think in the early summer, Mr. Edison stated to me that he considered one of the proofs of invention in his 200 thread sound record upon which application Serial No. 350,646 was filed, to be the fact that a practicable 200 thread sound record had been desired for many years, but had never been achieved prior to his invention, because of the failure of all the manufacturers to realize that the cutting stylus for the 200 thread record should be not one-half the diameter of that used for making the 100

[ATTACHMENT]

thread record, but much smaller, and in fact about one - quarter the diameter of the 100 thread record recorder. He also stated that he understood that the Premier Manufacturing Company in England had made a 200 thread record which was too weak in volume to be successful, because they had not realized this important point of his invention. In connection with this matter, I have ascertained the following facts:-

Apparently, the Premier Manufacturing Company, Ltd. endeavored in the fall of 1908 to manufacture a 200 thread record, but met with various difficulties and only succeeded in making a practicable 200 thread record about February, 1909. The record which they then made and which they are still selling is called the Clarion record and is of sufficient volume, being made, apparently, by a recording stylus of about the same diameter as that which the National Phonograph Company uses for making the 200 thread record, that is to say, about .008 inch in diameter. The Premier Company, however, did not learn how to make a 200 thread record having sufficient volume until many months after the Edison 200 thread record appeared in England.

I submit herewith the following papers which were received by me January 18, 1910, having been forwarded to us by Thomas Graf, Managing Director of the National Phonograph Company, Ltd. in London, England.

First: Copy of a circular which was sent to the trade in November, 1908 by the Premier Manufacturing Company.

[ATTACHMENT]

Second: Printed circular of the Premier Manufacturing Company, dated February, 1909.

Third: An original list of the Premier Company which is headed "First List of Ebonoid Five Minute Records", issued in April, 1909.

Fourth: First Retail Dealers Agreement of the Premier Company dated April, 1909, containing five minute records and attachments.

Fifth: Page taken from "Phono Trader and Recorder" of January, 1909, in which the Premier Manufacturing Company state that they are now manufacturing their first samples of the new 200 thread Clarion record.

Sixth: Page taken from the "Phono Trader and Recorder" of February, 1909, in which they state they shall announce the new list of the five minute records this month.

Seventh: Page taken from the "Phono Trader and Recorder" of April, 1909, containing an advertisement of the Premier Manufacturing Company giving their first list of Ebonoid five minute records.

On examining these papers, it will be seen that in the first the circular sent to the trade in November, 1908, which was shortly after the Edison 200 thread records appeared in England, they state that they are sending under separate cover a test record of the new 200 thread cylinder record, together with a sapphire point which may be fitted in the Model C reproducer (which is the regular reproducer used by the National Phonograph Company to play Edison 100 thread records). They request their

[ATTACHMENT]

dealers to test this record and to let them have their views as to the quality of the same.

I have not as yet succeeded in obtaining one of these test records, but hope to do so. By referring to paper No. 2, however, it appears that the test record, if any such was sent out, and all 200 thread records made by them up to that time, had been unsuccessful. The circular states that the Premier Company have been making certain experiments in their laboratories with a view to overcoming the drawbacks and the difficulties which up until that time had appeared in the making and using of records with a finer pitched thread than that of the usual 2-1/2 minute record. They state the difficulties which had to be overcome before a five minute record (that is, a 200 thread record) could become at all a practicable thing were - 1. Material. 2. Machines and Attachments. 3. Volume.

Referring to Page 3 of the circular under the heading "Volume", they state "This has been one of the stumbling blocks that has stood in the way of manufacturers introducing a record with a finer pitched thread with any degree of certainty as to the record ever finding a popular and ready demand." They then state that they have produced the new "Ebonoid" five minute record which has a sufficient volume. It also is to be noted in this circular, page 2, under the heading "Machines and Attachments" that the Premier Company adopted a special sapphire constructed to fit into the ordinary Model C reproducer. This is still the same Edison reproducer

[ATTACHMENT]

with which the first circular of November, 1908 stated the 200 thread record was to be played.

I should here state that I have seen one of the so-called Ebonoid five minute records and the same has 200 threads or approximately 200 threads per inch. I made a reproduction from the same upon an Edison phonograph in which the feed was one-two-hundredths of an inch for each revolution of the mandrel.

I am familiar with the technique of the acoustic art as practiced in the manufacture of cylindrical sound records, and from the facts indicated by the papers referred to and attached hereto, and particularly in connection with papers 1 and 2, I am strongly of the opinion that the record made by the Premier Company in November, 1908 was deficient in volume because of the fact that the Premier Company did not realize that the cutting stylus must be considerably reduced in volume below a diameter of say .020 inch in order to get a sufficiently deep groove, and that this difficulty was not overcome until January, 1909 or thereabouts, during which interval their experimenters had sufficient time and opportunity to thoroughly study the successful Edison 200 thread record. In February, 1909, the Premier Company referred to their difficulties in producing a 200 thread record and state that one of the chief of these has been the lack of sufficient volume. There are only two factors which contribute to the volume or loudness of reproduction from a sound record, first, the depth of the record groove, and second, the amount of amplification between the stylus and the diaphragm. That is to say,

[ATTACHMENT]

the loudness may be increased by making a deeper record groove or by increasing the ratio of leverage in the stylus lever. I am considering, of course, only the vertically undulating type of record. The Premier Company used the same leverage in their unsuccessful experiments of November, 1908, and in their successful operations beginning in February, 1909, since the circulars of November, 1908 and of February, 1909 both state that the ordinary Edison Model C reproducer is to be used, fitted, however, with a stylus sufficiently small to track the record groove. Since the leverage was the same in both cases, the increase in volume must have come from cutting a deeper record groove. Since the width of the groove is limited by the number of threads per inch, this result is only accomplished by considerably decreasing the diameter of the cutting stylus, the sound record groove in the Premier record being approximately circular in cross section. The factor of material has nothing to do with the loudness of the record, the leverage being the same, but only with the life of the record under the increased wear of the stylus in the more narrow record groove. Of course, the loudness might also be increased by using a larger amplifying horn, but the horn is evidently the same in both cases with the Premier Company, since nothing is said about it and their record is stated as being adapted to be reproduced upon any standard phonograph.

If I succeed in obtaining one of the test records sent out by the Premier Company in November, 1908,

[ATTACHMENT]

or if I succeed in obtaining an affidavit from any one having personal knowledge of the difficulties and experiments of the Premier Company referred to, I will at once file the same in this case. However, it seems obvious that conditions must have been as indicated above for the reasons stated.

I will also state that to the best of my knowledge and belief no successful 200 thread cylinder sound record or one embodying Mr. Edison's invention was ever made before his said invention or placed upon the market before the Edison 200 thread record known as the Amberol record. If any such records had been made and manufactured, knowledge of the same would have come to myself and the other attorneys in Mr. Edison's Legal Department.

Sworn to and subscribed before me
this day of March, 1910.

Mr. Petit:-

You remember these
200 thread ^{feed} machines and records
we shipped to England in 1895.
There was a 50 thread feed screw
with 4 to 1 reduction.

Did you make the records
for them, or did you make the
machines, or work on both?

Dyer Smith

I remember very little about
these machines. I think that the
feed was constructed as you say
50 screw with 4 to 1 reduction.

I did not make the records -

I made the machines by Contract
from start to finish

A. N. Petit

**LEGAL DEPARTMENT RECORDS
PHONOGRAPH - INTERFERENCE PROCEEDINGS**

These interferences involve patent applications filed by Edison, Edward L. Aiken, Wilburn N. Dennison, Thomas H. Macdonald, Alexander N. Pierman, Peter Weber, and others. Documents have been selected from the records of five interferences involving the duplication and amplification of records, a recording cutter, and a sound box. The selected material consists of patent office filings, correspondence, briefs, and testimony that discuss Edison's role in the invention process or the interference proceedings. Two closely related proceedings have been grouped in the same folder.

The interference records not selected involve concealed horns, reproducers, return devices, speed regulators, and a variety of other improvements.

Macdonald v. Edison (No. 20,775)

This folder contains material pertaining to a Patent Office proceeding involving Edison's U.S. Patent 648,935 on apparatus for duplicating phonograph records and a competing application filed by Thomas H. Macdonald on June 2, 1900. After being denied a patent by the examiner of Interferences, Macdonald pursued the matter through three levels of appeal.

Edison v. Petit v. Capps (No. 22,202)

Edison v. Jones (No. 22,203)

This folder contains material pertaining to Patent Office proceedings involving an application for a patent on a recording stylus, filed by Edison on November 8, 1901, and competing applications filed by Frank L. Capps, Joseph W. Jones, and Ademor N. Petit.

Edison v. Smith (No. 25,460)

This folder contains material pertaining to a Patent Office proceeding involving an application for a patent on a sound box or diaphragm assembly, filed by Edison on November 13, 1903, and a competing application filed by Eugene C. Smith.

Edison v. Macdonald (No. 25,677)

This folder contains material pertaining to a Patent Office proceeding involving an application for a patent on an amplification device, filed by Edison on September 15, 1905, and a competing application filed by Thomas H. Macdonald.

**Legal Department Records
Phonograph - Interference Proceedings**

Macdonald v. Edison (No. 20,775)

This folder contains material pertaining to a Patent Office proceeding involving Edison's U.S. Patent 648,935 on apparatus for duplicating phonograph records and a competing application filed by Thomas H. Macdonald on June 2, 1900. After being denied a patent by the examiner of interferences, Macdonald pursued the matter through three levels of appeal. The one selected item is Edison's brief in the hearing before the examiners-in-chief.

Legal Box 117

United States Patent Office.

THOMAS H. MACDONALD

vs.

THOMAS A. EDISON.

Interference No. 20,775.

Duplicating Apparatus.

Before the Honorable Examiners-in-Chief.

BRIEF FOR EDISON.

DYER, EDMONDS & DYER,

Attorneys of Record.

FRANK L. DYER,

Of Counsel.

G. G. Burgess, Walker and Centre Streets, N. Y.

UNITED STATES PATENT OFFICE.

THOMAS H. MACDONALD

vs.

THOMAS A. EDISON.

Interference No.
25,775.
Duplicating Appa-
ratus.

BRIEF FOR EDISON.

Statement.

This is an interference between Edison Patent No. 648,935, dated May 8, 1900 (application filed October 28, 1899), and an application of Macdonald filed June 2, 1900. It appears (Macdonald, Rec., p. 31, x-Q, 50) that the Macdonald application was filed only after his counsel had read the Edison claims in the Official Gazette. Macdonald's course in this respect confirms the position which we shall take in our argument, that whatever may have been done by him towards the development of the invention was in the nature of an unsuccessful and abandoned experiment, which had, apparently, passed out of his mind, and would have remained in innocuous desuetude if Edison had not independently invented and reduced the apparatus to practice.

Edison relies on the filing date of his application (October 28, 1899) as a reduction to practice of the in-

vention. Macdonald alleges conception of the invention in November, 1897, disclosure to others at that time, the making of working drawings in June, 1898, the construction of a full-sized machine between August 1, 1898, and October 1, 1898, and the successful operation of that apparatus on the latter date.

The Invention in Controversy and the Circumstances Leading to Its Production.

Before discussing the relative merits of the cases presented by the two contestants, it should first be explained what the invention is that the parties are here contending for, in doing which we shall try to give the philosophical reason for the making of the invention by Edison.

A phonograph record, as is well known, is formed in a cylindrical waxlike blank by the cutting or gouging action of a curved-edged recording device, which is connected to the diaphragm. If the diaphragm is not vibrated by sound waves, the recorder will merely cut in the blank a spiral groove, the cross-section of which is the arc of a circle. If, however, the diaphragm be vibrated on either side of its medial line, the width and depth of this groove will be obviously increased or diminished as the recorder moves toward or away from the blank. Examined under a microscope, therefore, a phonographic record is found to consist of a series of gouges, which vary in width and depth, and which are connected together, unless, of course, the recording device is vibrated so violently as to actually leave the surface of the blank. Since the record is cut by a curved-edged recorder, it is obvious that the width of these gouges bears always a definite relation to their depth. The length of such gouges depends, however, upon two secondary considerations: first, the extent to which the record surface may be moved during the formation of any particular gouge,

and, second, the rapidity with which the diaphragm may have vibrated. It is evident that, if the record surface be moving very slowly, the curved-edged recorder will be permitted to form a gouge of but slight longitudinal extent; whereas, if the recording surface be moved at a relatively high velocity, a gouge formed by the same vibration will be proportionately elongated. On the other hand, if the vibration is of excessive rapidity (indicative of high pitch), the gouge will be formed so quickly as to be relatively short, even though the speed of the recording surface be high.

In order to reproduce from a phonographic record, a reproducing ball is employed, which is connected to the diaphragm and which is supposed to accurately track the connected gouges constituting the record. These reproducer balls are ordinarily slightly less in diameter than that of the curve of the cutting edge of the recorder. Owing to its spherical form, it is obvious that a reproducer cannot track to the bottom of a record gouge unless the latter be at least as long as it is wide, because otherwise the reproducer would engage the front and back walls of such a gouge and be prevented from fully entering the same.

In practice the pitch of the feed-screw of modern talking machines is .01 of an inch, so that the available width of surface for the formation of the record is extremely narrow. Modern phonographic recorders are generally about .04 of an inch in diameter, so that obviously the record groove, even if of its maximum width (.01 inch), will be very shallow. Any record gouge which is materially less than .01 of an inch, therefore, cannot be tracked by the spherical reproducer, which in practice have a diameter of about .035 of an inch.

When the phonograph was originally invented, it was designed largely as a substitute for stenography, and hence the records as originally made were not loud, and, therefore, neither wide nor deep. Even with

a comparatively slow surface speed of the blank, a record made for dictation purposes would, therefore, be practically free of untrackable gouges or depressions of less length than width. Instead of the phonograph developing along the line indicated, the development proceeded to an enormous extent in the field of entertainment, and most of the talking-machine records sold during the past few years have been musical in character. The original phonograph, as designed as an office amanuensis, made use of listening tubes, but with the advent of musical records it was found necessary to so increase their volume as to permit reproduction by means of a horn. It has, therefore, been the aim of the manufacturers to make louder and louder records, the recording machines being suitably modified to accommodate sounds of greater volume.

The making of very loud musical records presented, however, a greater difficulty than might be supposed. In the first place, a musical record, especially when composite, like that of a brass band or orchestra, is extremely complicated, the number of gouges or depressions as compared to an ordinary talking record being enormously increased and hence relatively shorter, as they must be received on a recording surface of the normal length. In the second place, in order that such musical records may be very loud, the original sounds are of correspondingly greater volume, so that the vibrations of the recording diaphragm will be similarly increased, and, therefore, the depth and width of the gouges or depressions constituting the record will be likewise augmented. Edison found, for example, that with an ordinary phonographic musical record sufficiently loud to be heard through a horn most of the gouges or depressions were of greater width and length. It followed that such records could not be accurately tracked by a reproducing ball, which would be permitted only to glance over the crests of the waves, and hence which would not communicate to the

reproducing diaphragm the full amplitude of the original vibrations. Having made this observation, and having found that the public demand had resulted in the production of a record which could not be tracked by the ordinary reproducing device, Edison turned his attention to the making of a reproducer which could track such a record. Such a reproducer was invented and is described in Edison's Patent No. 659,457, dated June 26, 1900, the application for which was filed September 21, 1899, about a month prior to the application for the patent in interference, both applications pending contemporaneously. The reproducer patent in question, owing to a mistake on the part of the Patent Office, was released September 25, 1900, No. 11,857. In this patent Edison points out the difficulties which we have explained, states that he effects a perfect tracking of the record "by the employment of a reproducer of such a form that it will enter all portions of the record as at present made at the usual surface speeds," and "chains broadly, in combination with an ordinary loud record phonograph,

"a reproducing device having a curved bearing surface engaging the bottom and side walls of the record and of a form adapted to enter and accurately track all of such representative waves."

Such was the situation in the development along the special line with which we are here dealing when the matter of the invention in controversy was presented.

It is well known that practically all of the phonographic records now sold are duplicates made by a mechanical duplicating process, wherein a reproducer engages a suitable master and communicates its vibrations to an ordinary recorder in engagement with a rotating blank. In this way a single master can reproduce a large number of satisfactory duplicates before it becomes useless, while the first dupli-

ates obtained, being practically as good as the original, can be retained for use as future masters. If a master record is of such a character that portions of its constituent grooves are of less length than width, then it will be obvious that the reproducer ball will not track to the bottom of such grooves, and hence the recorder actuated thereby will not cut into the duplicate to a depth corresponding to that of the master. In other words, the duplicate record will be less in depth than the original record, being so shallow, in fact, as not to contain any grooves of less length than width. Such duplicate records can, therefore, be accurately tracked by a reproducer ball, and the same effect will be obtained from them as would be secured from an original record of greater depth, but which cannot be fully tracked by the reproducer.

So far as regards the ordinary spherical reproducing devices, the usual mechanical duplicating process was all that could be desired, as it resulted in the production of duplicates of as great a volume as can be accurately tracked by such reproducers. When, however, Edison invented the reproducer of his release Patent No. 11,867, it was found that the reproduction secured from an original was immeasurably superior to that obtained from a duplicate, owing to the greater depth of the former record which was accurately tracked throughout all portions by the new reproducer. It was, therefore, necessary to make a duplicating apparatus capable of producing duplicate records which shall in all respects of depth and width correspond with a master record. Such is the apparatus involved here in interference.

In his patent in interference Edison says that his object

"is to provide an apparatus for obtaining duplicate phonographic records which shall be equal in volume and quality to an original or master record and, from which in consequence, superior reproductions can be secured, particularly if the

reproducing device is of a character to accurately track all portions of the reproduced record."

i. e., a reproducer as broadly claimed in release Patent No. 11,867.

Briefly stated, what the present invention consists of is the provision of a master record of increased diameter, whereby the length of the record groove will be correspondingly increased, so that the grooves or depressions of the record will be spread out and hence will be always of greater length than width, and, therefore, capable of being accurately tracked by the reproducer ball of the duplicating apparatus. The duplicating reproducer ball, in consequence, vibrates to its full amplitude and correspondingly actuates the recorder, which cuts a duplicate record of the full depth, which duplicate can only be accurately tracked by a reproducer of the type for which Edison has been granted a broad patent. For any other kind of reproducer the record possesses practically no greater value than duplicates made from masters of the normal diameter.

We have shown, therefore, that the invention by Edison of the machine in controversy followed a logical line of experiments and is the immediate outcome of the invention by him of a reproducer which he has broadly patented. If Edison had not invented such a reproducer, the principal incentive for the making of the present invention would be absent, since, as we have said, duplicates made with the improved apparatus cannot be tracked any more readily by the ordinary spherical reproducing devices than can the duplicates made by the prior apparatus. Macdonald does not make out any case of intelligent invention, and the production by him of an apparatus involving that invention was not, as with Edison, made for the solution of a single definite problem arising as a necessary consequence from the making of a broad

invention. In fact, as we have said, Macdonald's actions, in our opinion, indicate that whatever may have been done by him must be regarded as an unsuccessful and abandoned experiment of no special importance from his standpoint, which had been practically discarded and would not have been revived if Edison's Patent had not been called to his attention by his counsel.

The issues in interference are Edison's claims 1, 2 and 3, as follows:

"COUNT 1. In an apparatus for reproducing phonograph records, the combination with a mandrel carrying a record of large size, said record being of a sufficiently large diameter as to be free of waves or depressions which are of less length than width, and a second mandrel extending parallel therewith and carrying a blank of smaller size, of means to rotate both mandrels, a reproducer engaging the master record, a recorder engaging the blank, and connections between the reproducer and the recorder.

"COUNT 2. In an apparatus for reproducing phonograph records, the combination with a mandrel carrying a record of large size, said record being of a sufficiently large diameter as to be free of waves or depressions which are of less length than width, and a second mandrel extending parallel therewith and carrying a blank of smaller size, of means to rotate both mandrels at the same shaft speed, a reproducer engaging the master record, a recorder engaging the blank, and connections between the reproducer and the recorder.

"COUNT 3. In an apparatus for reproducing phonograph records the combination with a mandrel carrying a record of large size, said record being of a sufficiently large diameter as to be free of waves or depressions which are of less length than width, and a second mandrel extending parallel therewith and carrying a blank of smaller size, of means to rotate both mandrels at the same shaft speed, a bridge straddling the master, a reproducer pivoted to said bridge, a recorder engaging

the blank, and connections between the reproducer and the recorder."

It may be said, generally, that the only difference between the several counts of the issue and the ordinary mechanical duplicating apparatus which preceded the present inventions resides in the fact that in each count the mandrel carries

"a record of large size, said record being of sufficiently large diameter as to be free of waves or depressions which are of less length than width."

In the Edison Patent in interference, it is stated that:

"A record made on a cylinder having a diameter of from five to six inches, and rotated at the usual shaft speed of about 120 turns per minute, will be sufficiently extended as to be practically free from waves or depressions which cannot be accurately tracked to the full depth by a spherical reproducing device."

In the Macdonald application he states that his invention

"consists briefly in the employment, in a suitable duplicating apparatus adapted to carry a blank of standard size, of a master record in or upon which the waves or depressions that constitute the very record of sound are of such comparative length that they may be readily entered, and the record groove truly tracked by the follower or reproducer—in other words, a master on which the record grooves are abnormally extended or lengthened. The length of the waves or depressions must not be less than the diameter of that portion of the reproducer that is to enter them—that is to say, *not less than their width.*"

Taking the statements of both parties and the specific language of the issues into consideration,

there can be no doubt but that the invention for which the parties are here contending is one wherein the master record which is carried on the large mandrel shall be "free of waves or depressions which are of less length than width."

Macdonald's Case.

As against Macdonald, we shall argue:
First, that the specific invention in controversy was never actually reduced to practice by him.

Second, that the apparatus on which he bases his claim for actual reduction to practice was an abandoned experiment.

Third, that he abandoned the invention.

I.

Macdonald testifies:

"In the fall of 1897 I became convinced that it was necessary to obtain better reproduction in order to get better duplicates for commercial purposes. After examination of many of our masters, I was of the opinion that the surface speed was too slow, and that therein lay the chief difficulty. In many of the longer and higher tones I could see the vibrations crowded together so closely as to make it plainly apparent that they were not fully recorded, and even what was there were not fully reproduced. * * * I made a number of experiments at various speeds to try, if possible, to find a speed that would be the best for all practical purposes. For this purpose I arranged a recording machine so that I could make dictations at a number of speeds varying from the ordinary—that is, about one hundred and twenty revolutions per minute, up to seven or eight hun-

ded. On this machine I made a great many dictations of varying loudness, and listened to the reproductions. My conclusion from this series of experiments was that there was an increase of quality and loudness in the record very noticeable up to a surface speed of about eighteen hundred inches per minute, or somewhere in that neighborhood. Beyond that point I did not think the increase so marked. I became convinced that the reason of the increase in volume and quality was owing to the fact that the recorder was not interfered with in its vibrations by the material behind the heel of the cutter, and also because the reproducer point was able to follow the contour of the waves engraved on the cylinder much more assembly than when they were crowded closely together. * * * I then determined to build a recording machine which would make a record upon the cylinder five inches in diameter, and also a duplicating machine which would carry this five-inch cylinder and duplicate the record upon an ordinary blank" (Macdonald Record, p. 12, Q. 30).

Macdonald testifies that the duplicating machine referred to was completed about the last of August, 1898 (Macdonald Record, p. 8, Q. 8), from sketches made in the same month (p. 9, Q. 12). Photographs of the machine are introduced in evidence. These photographs, as well as the machine itself, show an apparatus employing a large and a small mandrel arranged side by side, rotating at the same shaft speed, with a bridge straddling both of the mandrels, a reproducer engaging the record on the large mandrel and a recorder engaging the blank on the small mandrel, such recorder and reproducer being connected together. This is the machine which Macdonald relies upon as showing a completion of the invention, but it is to be particularly noted that the apparatus in question does not use, and never did use, the special kind of record which is made a specific element of each copy of the issue; namely, one "free of waves or depressions which are of less length than width."

Macdonald, in fact, was directly asked by his counsel (Q. 24a):

"In the Grand record a record of sufficiently large diameter as to be free of waves or depressions which are of less length than width, as called for by the counts of the issue?"

He replied:

"It is not. The majority of the waves on all Grand records are of much less length than width. This, of course, is also true of the small record."

Macdonald's attention being called to the statement in his application that with the master record the "length of the waves or depressions must not be * * * less than their width," he was asked if such a description, corresponding as it does to the exact terms of the issue, applied to his original apparatus, and he answered that that would only be "true in a measure," but that with the master as used by him the result "would be two and a half times better than upon the ordinary blank" (Macdonald Record, p. 21, x-Q. 25). Being further asked (x-Q. 24) if the statement in his application that the length of the waves must be "not less than their width" was not inconsistent with his previous answer that the "majority of the waves on all Grand records are of much less length than width," he replied:

"There may be an inconsistency here. It is at best a matter of opinion as to the exact length and comparative length of these waves."

So far as concerns Macdonald's direct and cross examination, it is perfectly clear that he fails to show a reduction to practice of the specific invention of the issue in his original apparatus, but that, on the contrary, he has very definitely shown that with that apparatus some other invention was used. On re-direct

examination Macdonald attempts to bring the original apparatus within the terms of the issue, without directly contradicting his positive previous testimony, by calling attention to the fact that the masters as used by him were five inches in diameter, and we have no doubt that it will be argued by Macdonald that, since Edison refers in his patent to a master "preferably from five to six inches" in diameter, both inventions must be regarded as patently identical. We reply to such an argument by calling the Examiner's attention to the fact, first, that Macdonald has specifically testified to the effect that the original master used by him was *not* of the character covered by the issue, and, second, that a master five inches in diameter need not have a record free from waves or depressions, less in length than in width, for the reason that, by recording extremely loud or high sounds, the increased surface speed of such a master would fail to result in sufficient elongation of the record as to obviate such objectionable features. In other words, no matter how high the surface speed or how great the diameter of a master record may be, it is still possible to record thereon notes of such great amplitude or high pitch as to make a record which cannot be tracked by a spherical reproducer, and hence which is outside of anything which Edison has claimed in his patent, or which is involved in this controversy. So far as Macdonald's testimony is concerned, such an assumed record is the one which was used by him.

Macdonald supports his case entirely on his own testimony and on the testimony of the witness Osborne. This witness throws no more light on the vital point of the issue than does Macdonald. Osborne states that he has examined "microscopically one of the master records which were used on this machine" (Macdonald Record, p. 37, x-Q. 5), but being pressed for an answer "whether the record was formed of grooves which were of greater length than width, or of less length than width," he was instructed by counsel to decline

to answer the question. The objection to our cross-examination as not being germane, we submit, was not well taken, since the point on which we desired information was an essential feature of the invention in the issue. The witness, having examined microscopically the master records used by Macdonald, was certainly qualified to state whether such records were of the character called for by the issue or something else. His failure to answer the question under instruction from counsel must, we submit, be taken as tantamount to an admission that the records were not of the kind to which the issue is limited. If, in fact, the records which were microscopically examined by Osborne were "free of waves or depressions which are of less length than width," as specified in the issue, we are at a loss to understand why the witness should not have so stated. No other conclusion can be drawn from the refusal of the witness to answer the question than that the answer, if made, would be unfavorable to Macdonald's case. Furthermore, since the testimony of Osborne is silent as to the character of the master used in the apparatus, the witness cannot be regarded in any sense as having corroborated Macdonald on the vital points of the case, even if we disregard Macdonald's express statement that the master used by him was not of the kind called for by the issue, and adopt the argument, which no doubt will be made, that, as his master was five inches in diameter, it must be assumed that it possessed the specific limitations of that issue.

We submit, therefore, that Macdonald cannot prevail, first, because he has failed to adequately prove that prior to Edison's application he reduced to practice the specific invention of the issue; and, second, because it follows directly from his own testimony, and by implication from the testimony of Osborne, that the apparatus as originally designed was of an entirely different character from that covered by such issue.

II.

After constructing his original machine in August, 1898, it appears to have been practically dropped by Macdonald. It will be remembered that Macdonald testifies that, while he was working on his original machine, he was also building a recording machine, designed for making the records of large diameter, for use in the duplicating apparatus. Speaking of the recording machine, Macdonald says:

"It made such a sensation and attracted so much of their [the officers of the American Graphophone Company] attention that I received immediate instructions from Mr. Easton, the president and general manager of the Company, to lay aside for the time being all work except the getting out of the Grand machine itself, and the making and selling the Grand machine and Grand records. The work upon the duplicating machine was, therefore, not pressed outside the laboratory experiments" (Macdonald, Record, p. 14, x-Q. 1).

So far as the original duplicating apparatus is concerned, Macdonald also testifies that "a number of duplicates were made" (x-Q. 2). In the same answer he says that the machine—

"was then changed, in that the present arm was removed from the machine and another arm substituted for making duplicates by what I will designate as, the pneumatic process. About forty thousand duplicates were made on this machine by that process; that is, using the five-inch or Grand blank of the master and transmitting the sound waves to the two and three-sixteenths or ordinary blanks; but, as stated in my previous answer, this was some time after the completion of the Grand machine itself, probably six months or possibly eight months later;" (x-Q. 4), in the summer of 1899 (x-Q. 4).

What the so-called "pneumatic process" was, and why the machine was altered from its original form, are not clear. Macdonald, in answer to re-direct question 12 (Macdonald, Record, p. 34), attempts to describe the pneumatic attachment, but his description is not sufficiently full and clear to enable the construction of that device to be known with absolute certainty. Macdonald does not rely, in support of his claim of reduction to practice, upon the machine as modified by him, but he rests his case solely on the machine as *originally constructed*.

Macdonald's testimony concerning the addition of the pneumatic attachment is entirely uncorroborated. It does not appear that the pneumatic attachment was lost or that it could not have been produced at the time the testimony was taken. His failure to clearly and completely disclose the construction of the so-called pneumatic attachment, or to have his uncertain testimony concerning the same supported by other witnesses, must, we submit, be regarded as an admission that in his opinion the machine as modified was not a reduction to practice. It certainly does not rest with us to cipher out, from the hazy description which Macdonald gives of the modification, the exact meaning which must attach to his words.

After modifying the original apparatus by removing the recording and reproducing devices and substituting the unidentified pneumatic attachment, Macdonald states that the latter device

"was again removed and the original apparatus now on the machine replaced about a month or six weeks ago (i. e., March, 1901), so that the machine is now in the shape it was when originally completed" (Macdonald Record, p. 16, x-Q. 5).

Osborne does not corroborate Macdonald as to the original operation of the machine in its present condition. He says the machine "was tried when completed" (Macdonald Record, p. 86, x-Q. 3). He was asked (x-Q. 3):

"Was the machine at that time actually used for making duplicates, or was it simply operated without a master record and blank?"

He answered:

"It was tried with the master *blank* and small P blank."

Of course, if there were a blank on both mandrels, the utility or operativeness of the machine could not be demonstrated. What is needed is a master record on the large mandrel and a *blank* on the small mandrel. It is true that Osborne states that he saw the machine in operation at other times for making duplicates (x-Q. 4), but he fails to say when this was (x-Q. 5), and the assumption must be that such successful operation was effected by the machine as subsequently modified by utilizing the pneumatic process therewith.

When the fact is taken into consideration that Edison has a patent, the application for which was filed many months before the Macdonald application, we submit that the nebulous character of Macdonald's proofs must be regarded as indicating an unsuccessful and abandoned experiment. He testifies specifically that the machine as actually constructed and as it now appears was immediately modified by the substitution of the pneumatic attachment, and his statement that the machine was opened in its present form is not corroborated by Osborne. Testimony of this kind, in our opinion, is not sufficiently clear and explicit to support the burden of proof.

A somewhat similar situation was presented in *Wurts vs. Harrington* (C. D., 1897, 20), wherein Wurts sought to overcome the filing date of his opponent's application by proving a single operative apparatus. In that case there was no question but that the original device used by Wurts embodied the issue of the interference, and the existence of that device was proved by no less than three witnesses. The Commissioner said:

"The fact that only one device was made and operated for only a short time, and that it was then laid aside and not used again until other parties were making the device and advertising it extensively, raises the presumption that the use was merely experimental, and that what was done amounted to no more than an abandoned experiment."

In *Putnam vs. Hollander* (C. D., 1881, 246) a single bottle stopper embodying the invention in controversy had been actually used and its successful operation fully proved. Yet the Court held that, as this single device had not been subjected to the test of actual transportation, its use amounted only to an abandoned experiment.

In *Washburn & Moen Mfg. Co. vs. Best-Ever-All Barbed Wire Co.* (C. D., 1892, 209) the Supreme Court held that, since the device was made and afterwards lost, it must be regarded as an abandoned experiment, for, if the maker had considered it of any practical value, he would have applied for a patent on it, as he applied for patents on other devices subsequently.

This is the situation here. Macdonald did not apply for his patent, as we have said, until his counsel had read the Edison claims in the "Gazette," while, after the making of the original machine and before the filing of the application, other applications for patents were filed by him (McDonald Record, p. 31, x-Q. 49).

See, also, *Dearing vs. Winona Harvester Works*, C. D., 1894, 672.

In the several cases to which we have referred there was no question but that the prior device embodied the invention in controversy, and its substantial operativeness was in each case conclusively established. In the present contest Macdonald admits that his original apparatus did not contain the invention of the issue, and, even if such were not the case, the operativeness of that apparatus has not been proved.

A case on all-fours with the present situation, though not so strong, since the application of the junior party was filed prior to the issue of the patent to his opponent, is *Glidden vs. Baidel* (C. D., 1894, 48). In that case Glidden relied entirely on a machine constructed by him in 1886. This machine was sufficiently operative to trim and rand a few heels, and was, in fact, so used. It was, however, dismantled, and experiments with other forms of driving mechanism were carried on. It was only after the interference was declared that the original machine was reassembled, and the attempt was made to support a claim of actual reduction to practice thereon. After reviewing all the circumstances of the case, the Commissioner held, however, that Glidden's early work must be regarded as an abandoned experiment.

The similarity between that case and the present one is striking. Both Glidden and Macdonald constructed an original machine. Glidden's device was operative in a measure. Macdonald says that his device worked, but his testimony is uncorroborated. Both Glidden and Macdonald, after making their original machines, commenced experiments in other lines. Glidden ultimately achieved success, in which respect Macdonald's proofs are lacking. Finally, both Glidden and Macdonald reassembled their original apparatus, and Glidden sought, as Macdonald now seeks, to support a claim of actual reduction to practice thereon. If in the former case Glidden's early machine was regarded as an abandoned experiment, we submit that in the present case Macdonald's original apparatus should be so considered.

On appeal to the Court of Appeals (C. D. 1895, 273) it was held that, although the original Glidden machine trimmed a few heels, it "would not operate continuously and successfully," and that, therefore, "the machine of Glidden was inoperative and practically a failure."

III.

We have pointed out the line of the development of the invention by Edison, and have shown that the present apparatus was the logical outcome of the invention by him of a reproducer which for the first time in the art was capable of accurately tracking all portions of a phonograph record of standard diameter and sufficiently loud to be heard through a horn. Edison's Patent in interference clearly states the theory upon which the present invention is based—*i. e.*, the utilization of a master having such an extended record as can be tracked by a spherical reproducer, so that the resulting duplicates will correspond, in depth and width of the grooves constituting the record, with an original record made on a blank of standard diameter. Since Edison was the first to make a reproducer which can track a duplicate of the kind made by the present apparatus, the question naturally arises: What was Macdonald's purpose in making an invention for the production of duplicates which could not be tracked by any reproducer known to him at the time? Macdonald's explanation is not particularly convincing. He says that he wished to make a master taken at high surface speed, because by doing so a more perfect record would be formed. Thus, in answer to x-Q. 26 (Macdonald Record, p. 22), he says:

"This high or increased speed carries the material under or behind the heel of the cutter away, so that, in the downward movement, the cutter is not interfered with by this material; consequently, the cut, results in a more accurate sound wave.

In his application, filed December 5th, 1908, on the so-called Graphophone Grand, Macdonald makes the statement:

"The present invention involves the principle which may be briefly stated as follows: The speed imparted to the record tablet should be such that the crest of each undulation moves from under the record and recording style so rapidly that the heel of the latter at no time makes contact with the recording material; and that the diaphragm is free to give its full sweep. The invention, therefore, consists primarily in imparting to the tablet during the recording operation a surface speed which will secure the result above stated. It has been found that a surface speed of about forty-four meters per minute will secure the desired operation."

Macdonald still agrees with this statement (p. 20, x-Q. 46). Furthermore, Macdonald, in an affidavit filed in the same application on the Graphophone Grand, referring to himself in the third person, said

"that, from his intimate knowledge of the art, he has no hesitation in asserting that, in making records by and in accordance with his said invention described in his said application, the recording surface travels at such a high speed as to withdraw the crest of each undulation from under the heel of the recording style before the same has damped or checked the vibration of the style; in other words, that the surface of the recording tablet moves relative to the style with a high surface speed sufficient to prevent the heel of the style from making contact with the undulations; furthermore, deponent says that, from his knowledge of the art, he confidently asserts as a reason why sound records cut in wax, or waxlike material, as the same were produced prior to his said invention, did not give reproduction sensibly equal in volume and corresponding in character to the original sounds, is that the surface of the recording tablet moved, under the recording style with a speed so slow that the heel of the style made contact with the undulations, thereby damping vibrations of the style and diaphragm, and necessarily causing the style to cut undulations not only of less amplitude, but materially

differing in character from the original sound wave.

Asked (p. 31, x-Q. 47) if he still agreed with these statements, he replied:

"I cannot identify this particular affidavit, but will state that I believe the substance of what is stated is correct—that is, the heel of the cutter is interfered with at slow speed, and this has the effect of producing a record of less volume than where the speed is higher."

Having reference to Macdonald's pretended theory, that phonographic records as heretofore made on blanks of standard diameter were imperfect because the surface speed was not sufficiently high to prevent heeling, he was asked (p. 24, x-Q. 29):

"Were you the first, so far as you know, to suggest this possible difficulty in recording sounds, and to explain the way by which that difficulty could be overcome?"

He replied:

"I believe that I was the first to suggest a way by which this difficulty could be overcome. I might say I believe myself to be the first to have recognized this as the difficulty in the way, and to suggest the means of overcoming it in this type of machine; that is, a five-inch blank at a high surface speed."

Macdonald's reference to the use of a master of abnormally large diameter is obviously inconsequential, since in his *Graphophone Grand Application* of December 6th, 1888, he says that a high surface speed is alone necessary, and the Examiner will find, upon reading that application, that Macdonald specifically refers to the securing of a high surface speed by the operation of a standard blank at an abnormally high

shaft speed, as well as by the use of a blank of large diameter.

We have referred to Macdonald's pretended theory in this case solely for the purpose of showing that that theory is inconsistent with his present attitude—i. e., that he conceived and reduced to practice the invention here in controversy, which is based upon Edison's discovery of the true difficulty. The invention in controversy is described by both parties as depending solely upon the supposition that the master must be of such a character as will permit the record thereon to be accurately trucked by the reproducer ball. That is the theory which Macdonald has adopted in his application, and is one in which he has taken bodily from the Edison Patent.

Macdonald's theory in reference to the making of the record is outside of the case and one which Edison does not adopt. Anyone skilled in the art must know that a recording surface should be moved at a sufficiently high speed as to prevent the heel of the recorder from striking the crest of the wave. That speed depends absolutely upon the amplitude and rapidity with which the diaphragm vibrates. If a diaphragm vibrates with great rapidity, a higher surface speed must be imparted to the recording surface to prevent heeling than if it vibrated with less rapidity. Macdonald himself admits that this is theoretically true (*Macdonald, Record*, p. 23, x-Q. 27). Edison, and we presume all other skilled persons, knew this years ago. For example, Edison's Patent No. 368,908 dated December 4, 1888, states:

"It might be supposed that a cutting tool would be unsuitable for the recording point, and that the heel of the tool would strike the bottom of the groove and prevent the formation of a perfect record or obliterate the record as made by smoothing or pressing out the indentations more or less; but I have found that the movement of the recording surface is sufficient to keep the heel of the

tool clear of the indentations" (p. 1, lines 45 to 58. See, also, Edison Patent 393,907 of the same date).

So far as concerns Macdonald's theory as to "heeling" in the formation of the record, we assert without hesitation that it is without basis, and that the true causes for imperfect reproduction in a duplicating apparatus is that which Macdonald has now adopted in his application in interference, and which Edison fully explains in his patent here involved—i. e., that sound waves formed on records at slow speed are, when loud enough to be heard through the horn, of such a form that they cannot be accurately tracked by a spherical reproducer. The heeling to which Macdonald refers is not even experienced when records are formed at the ordinary and usual surface speeds.

Having referred to his pretended theory of heeling, for which in practice there is no basis, Macdonald states that he obtains a more perfect master, and secures, in consequence, more perfect duplicates therefrom. Thus, he says (Macdonald, Record, p. 21, x-Q. 28) :

"There are, I believe, many sound waves which are recorded and which can be reproduced well by the reproducers simply touching the crest of the record without fully entering the groove. I believe that it is not so much in the reproducing as it is in the recording. The great improvement, in my opinion, is in the fact that the rapidly-moving surface of the Grand blank permits a much more nearly perfect record wave to be inscribed thereon, and that, once we have a perfect negative or record, we obtain necessarily much better duplicates.

From Macdonald's point of view, we submit that such a result for duplicating purposes is impossible. If it be admitted that the reproducer in engagement with the large master tracks to a greater depth than would be the case if it engaged a small master, so that the

resulting duplicate will be deeper in the former than in the latter case, Macdonald would secure a duplicate which, on his own admission, could not be tracked by a spherical reproducer, because he says, in the answer above quoted, that such a reproducer would not accurately track even the record of the large master itself. On the other hand, as we have before said, with the ordinary duplicating apparatus using a master of standard diameter, the record of which is not tracked to the full depth by the reproducer, the recorder will cut in the duplicate a record the depth of which corresponds in extent to the amplitude of vibration of the reproducer, and such a duplicate would be, therefore, just as effective for the ordinary reproducer as would be a duplicate made from a master of large diameter. Macdonald practically admits this :

"x-Q. 38. Did you ever compare an original standard record made at the usual surface speed with a duplicate record made from a five-inch master, so far as quality and other desirable characteristics are concerned ?

"A. I have.

"x-Q. 39. How did they compare ?

"A. The duplicates are not so good, but they are better than duplicates made from an ordinary blank.

"x-Q. 40. In what respects are these duplicates inferior to original standard records ?

"A. I think there is a loss in that vague something which we call quality, and, also, in loudness in some portions of the record; though some of the sounds seem to be recorded sometimes even louder than an original. In general I would say there is a difference in loudness and quality as compared with an original standard record" (Macdonald, Record, p. 27).

Thus, Macdonald expresses the opinion that a duplicate made by the apparatus of the issue is not so good as an original standard record, but is somewhat better than a duplicate made from a standard-sized master.

When the fact is recalled that the latter duplicates can hardly be distinguished from the original masters, it will be seen that whatever advantages Macdonald may have secured by the present duplicating machine, were, on his own admission, extremely small. It was not until Edison invented his new reproducer that the advantage of such a machine became apparent. We have no doubt that this was the reason which impelled Macdonald to his course of inaction. In other words, with the ordinary reproducer he saw nothing in it.

Furthermore, we direct attention to the fact that if Macdonald believed in his theory of healing and that such action prevented the formation of an accurate record, he must have seen that this objection would be met in the formation of a duplicate to as great an extent as in the formation of an original, since it was his object to make a duplicate which would correspond as closely as possible to an original. This may have been an additional reason for inaction on his part. It does not, however, rest with us to explain his motives or actions. It is sufficient only to say that the early machine which Macdonald made did not, on his own admission, contain the invention of the issue, nor does it appear from anything in the testimony that he even had a conception of such an invention prior to the filing of his present application, which appropriately bodily the theories advanced by Edison. If Macdonald's theories were made the basis of his application, it is apparent that the claims of the issue could not have been properly supported by the same. Whatever may have been the reason for Macdonald's failure to do anything with his machine as it now stands and as originally constructed, the fact remains, from his own statement, that immediately after the machine was constructed, it was changed by the substitution of the pneumatic attachment, and was only returned to its original condition a short time previous to the taking of his testimony. It is true that Macdonald states (Macdonald Record, p. 16, x-Q.

6) that he built a "second" machine in the fall of 1899, but the latter device is not produced, nor is it adequately described; furthermore, such construction was subsequent to the filing of the Edison application. After the original machine was constructed, nothing, so far as the proofs go, was done with it, since Macdonald's testimony as to its operativeness in its original condition is not corroborated. It was not until the Edison Patent had issued that Macdonald's interest in the apparatus was aroused, and his application was filed, based, as we have before said, on Edison's theory and in utter defiance of the theories which Macdonald elaborated in his Graphophone Grand application of 1898, and which he still pretends to believe in. He gives no explanation of his failure to file an application for a patent at an earlier date. He states (p. 16, x-Q. 8) that all of his patentable ideas

"are submitted to the president of the Company, Mr. Edison, and the patent counsel, Mr. Mauro, and their decision is the controlling factor in the matter."

that he did not urge upon those gentlemen the necessity of filing the application (x-Q. 10); that he does not know why the application was not before filed (x-Q. 11); that neither Mr. Edison nor Mr. Mauro gave him any reason for their failure to file an application (x-Q. 12); that the American Graphophone Company, his assignee, was financially able to file the application at any time (x-Q. 14); and that between the making of his original machine and May, 1900, patent applications were filed in his name on other inventions.

We submit that when all the facts are taken into consideration it must be admitted that Macdonald's interest in what may have been originally done by him was extremely slight. He does not seem to have cared anything about the apparatus even to the extent of ascertaining whether an application had been filed. Nothing, we submit, can

more clearly point to an actual relinquishment of an invention, if practical cessation of all interest therein amounts to abandonment. If we have convinced the Examiner that from Macdonald's point of view duplicates made by him were without special utility, and this seems to have been the case, a most excellent reason is furnished why that invention should have been abandoned by him. At any rate, Macdonald has not shown the unremitting efforts which usually characterize the work of inventors in the development of their devices, and we feel safe in asserting that his case as made out by him is not of a character sufficient to overcome all the presumptions of originality and validity which must attach to Edison's Patent.

The general rule of law applicable to an interference like the present, between a patent and an application filed after the grant of the patent, is that the degree of proof furnished by the applicant must be sufficient to overcome the patent if urged as a defense in a suit based thereon (*Degree & Carpenter vs. Bernstein*, 54 O. G., 711.), and it must indicate prior invention on the part of the applicant beyond a reasonable doubt.

Hansen vs. Davis, 55 G. G., 998.

Hunter vs. Jenkin, 56 O. G., 1705.

Wentz vs. Richardson, 57 O. G., 1425.

Hunter vs. Van Depoote, 57 O. G., 1720.

Dillon vs. Kimball & Wirt, 58 O. G., 884.

La Plante vs. Chase, 73 O. G., 741.

As stated by the Court of Appeals in *Doyls vs. McRoberts*, O. D., 1897, 413:

"As between the parties to the present controversy, McRoberts only has received a patent, and this, on its face, affords *prima facie* evidence that he is the inventor, and that the thing patented is a novelty, and the patentee will not be defeated of his rights under the grant unless the applicant shall establish the priority of his invention beyond a reasonable doubt."

In the present case we have only the testimony of Macdonald that his original machine was operative; yet he gives no explanation as to why the machine should have been changed. Since the machine as changed is not relied upon as a reduction to practice, it must be assumed that, in its modified condition, it did not embody the invention of the issue. The making of a single machine, the operativeness of which is not established, and which on Macdonald's admission was immediately changed, cannot, we assert confidently, be regarded as such an adequate proof of prior invention as should, beyond a reasonable doubt, be considered as sufficient to overcome the Edison patent. Proof of this kind, if urged in a suit based on that patent, would, we believe, receive but scant consideration by the Courts.

The Decision of the Examiner of Interferences.

The Examiner of Interferences bases his decision in Edison's favor on the failure of Macdonald's proof in this respect. As regards our contention that the testimony does not show that the original machine embodied the invention of the issue, the Examiner considered it unnecessary to discuss this point at length in view of the conclusion above arrived at. Concerning the operation of his original machine, Macdonald says that

"It was tried immediately upon completion, and it was used at frequent intervals in the laboratory for several months succeeding its completion (Macdonald, Record, p. 13, Q. 27).

"The machine * * * was used in the laboratory and a number of duplicates were made" (p. 15, x-Q. 2).

Osborne states that the machine "was tried when completed" (p. 36, x-Q. 2), and that he "saw it in

operation several different times in another department" (x-Q. 5).

After referring to this testimony, the Examiner said that

"It is at least a question whether he states anywhere in his deposition directly and unequivocally that he ever saw a duplicate made on the machine. Much less does he state what the character of the product of the operation of the machine was. And it may be said generally that both Macdonald and Osborne fail to testify directly that the machine produced duplicates useful, commercially or otherwise. In other words, the record fails to establish that the machine operated successfully. The circumstances in this case analogous to those in *Burr v. Ford & Poyson*, 70 O. G. 275, and, as the Examiner believes, the language of the Court in that case applies to the facts in this with even more force than to the facts in the case cited. In both cases the senior party was in possession of a patent granted prior to the filing of the junior party's application. In the case cited the established use of the lug or coupling was experimental. In the present case the machine 'was used in the laboratory'. In the case cited the article was of such a simple nature that it might almost be said that one should be able to determine from inspection alone as to its operativeness, and though the couplings were tested by being fitted to a wooden block and to an empty tank, the Court held that 'It was shown in the evidence that the pressure upon the lugs when enclosing a filled tank is very great and very different from that which is exerted by screwing up the cushioning tap,' and since Burr had failed to show that the device was operative, and operated in the position and under the circumstances for which it was designed, he, the junior party, had failed to establish his case. If in regard to so simple a device as that in the case cited, the Court required definite and unmistakable proof of successful operation, how much more should be required in reference to a machine of many parts and delicate in its method of operation. The following language also applies

to the present case: 'The burden of proof imposed upon appellant to make out his case in a clear and satisfactory manner, coupled with his long and unexplained delay in applying for a patent for this useful and valuable invention, made it incumbent upon him to exhaust all reasonable means within easy reach to prove the reduction of his invention to practice. It appears that he was not without means; that he was a practical business man, as well as an inventor; that he was to some extent informed with regard to the practice of the Patent Office, for he had twice before made applications for patents upon his inventions.' This holding of the Court, so far as the Examiner understands, has not since been modified, nor has the strict rule there laid down been relaxed; for in the late case of *Skarr v. McHenry*, 98 O. G. 585, the Court used this language: 'This rule in respect of the conclusive weight of evidence necessary to overcome the priority of invention evidenced by a regular and formal patent has been long established, and observation of its operation in general has had no tendency to incline us toward laxity in its application.'

Conclusion.

The decision of the Examiner of Interferences should be affirmed.

Respectfully submitted,

FRANK L. DYER,

Of Counsel for Edison.

**Legal Department Records
Phonograph - Interference Proceedings**

Edison v. Petit v. Capps (No. 22,202)

Edison v. Jones (No. 22,203)

This folder contains material pertaining to Patent Office proceedings involving an application for a patent on a recording stylus, filed by Edison on November 8, 1901, and competing applications filed by Frank L. Capps, Joseph W. Jones, and Ademor N. Petit. The selected items consist of Patent Office notifications, sworn statements, and memoranda regarding Edison's role in the proceedings.

J.H.D.

2-213.

[INTERFERENCE.]

DEPARTMENT OF THE INTERIOR,

United States Patent Office,

Washington, D. C., Nov. 11, 1902

Thomas Alva Edison,
Care Dyer, Edmonds & Dyer,
531 Nassau Street,
New York, New York.

U.S. PATENT OFFICE,
RECEIVED
NOV 4 1902
DIVISION 23.

U. S. PATENT OFFICE
NOV 11 1902
MAILED.

Please find below a copy of a communication from the Examiner concerning your application for Sound Recording Apparatus, filed Nov. 8, 1901, serial number 81,534.

Very respectfully,

22202

Room No. 219
All communications should be sent to
"The Commissioner of Patents,
Washington, D. C."

F. J. Allen,
Commissioner of Patents.

Your case, above referred to, is adjudged to interfere with others, hereafter specified, and the question of priority will be determined in conformity with the Rules.

The statement demanded by Rule 110 must be sealed up and filed on or before the 2nd day of December, 1902, with the subject of the invention, and name of party filing it, indorsed on the envelope. The subject-matter involved in the interference is

Count 1.

A cutting style for sound records having at one end a thin laterally projecting circular head having its periphery formed with a cutting edge.

Count 2.

A cutting style for sound records having at one end a thin laterally projecting head having its periphery sharpened and its face concave.

Count 3.

A cutting style for sound records provided at one end with a laterally extending disk shaped head having its periphery sharpened to form a cutting edge.

Ser. No. 61,534 ----- 2.

Count 4.

A cutting style for sound records provided at one end with a laterally extending disk shaped head having its periphery sharpened to form a cutting edge and having its face concave.

Count 1 is your claim 1; claim 7 of an application of Ademar H. Petit of Newark, New Jersey, for Phonograph, assigned to The International Phonograph and Indestructible Record Co., Limited, of Liverpool, England, whose attys. are L. W. Serrell and Son, #302 Broadway, New York, N.Y., and claim 23 of an application of Frank L. Capps of Newark, New Jersey, for Duplicating Phonographic Records, whose atty. is H. E. Knight, New York, N.Y., asso. atty. Philip Mauro, #620 F. Street, Washington, D.C.

Count 2 is your claim 2; claim 8 of Petit and claim 24 of Capps.

Count 3 is your claim 3; claim 9 of Petit and claim 25 of Capps.

Count 4 is your claim 4; claim 10 of Petit and claim 26 of Capps.

Mr Edison

Previous ~~to~~ ^{of} this time

Franklin was working
during December 1898 for
sundry work for the Edison light

Do you want to write Mr
Leyser about the questions he
asks -

J. P. Rindge

[ENCLOSURE]

Re: Various Gown & Gown -
phone Recorder -

- (1) Date of conception Dec 1898
 - (2) When were sketches made ~~about~~ ^{about} 1899
 - (3) When disclosed to others ~~about~~ ^{about} 1899
 - (4) When model made, if any -
first model about 10th of Jan. 1899
 - (5) When full size dress was
made and used, about middle of
1899
 - (6) Has invention been used to
any extent, and have others been
made and used - if so, how
many? Complete Working Records & Reproductions
made in Jan. 1899 by Mary Records
Taken & Reproduced on work
- Preliminary statements must
be filed before Dec. 2, but would
like information as soon as
possible.

Edison

Each ending Eugene Finkbeiner

Jan 5-1899	6 hrs	# 905	Long speaking
" 12-1899	64 "	# 905	Phono.
" 19-1899	73 "	# 905	
" 26-1899	60 "	# 905	

Jan. Feb - March.

UNITED STATES PATENT OFFICE.

THOMAS A. EDISON :
-vs.-
ADEMOR N. PETIT : Interference No. 22,202.
-vs.-
FRANK L. CAPPS. :

PRELIMINARY STATEMENT OF THOMAS A. EDISON.

State of New Jersey, :
County of Essex, : ss:

THOMAS A. EDISON, having been first duly sworn, on oath doth depose and say:-

That he is a party to the interference declared by the Commissioner of Patents November 11, 1902, No. 22,202, between his application for Letters Patent for Sound Recording Apparatus filed November 8, 1901, Serial No. 81,554, and the applications for patents filed by Ademor N. Petit and by Frank L. Capps, as recited in said declaration; that he conceived the invention set forth in the declaration of interference in the month of December, 1898; that he first made sketches of a cutting recorder embodying said invention in January, 1899; that he disclosed the said invention to others in January, 1899; that he first made a model of said invention about January 10, 1899; that he made a full-sized operative device embodying said invention about January 15, 1899, and that said device was operated at that time and a great many records were made and reproduced on wax; that he has made no other device embodying the invention except the one above specifically referred to.

Sworn to and subscribed before :
me this 18th day of November, 1902.:

Thos A Edison
Notary Public

Room No. 63.

2-224.

All communications should be addressed to
"The Commissioner of Patents,
Washington, D. C."

DEPARTMENT OF THE INTERIOR,

United States Patent Office,



K.V.D.

Washington, D. C., March 7, 1903.

IN RE INTERFERENCE

Edison v. Petit

No. 22,202. A

v.

Before the Examiner of Interferences.

Capps.

Sound Recording Apparatus.

Thomas A. Edison, C/o Dyer, Edmonds & Dyer, 31 Nassau St., N.Y. City.

Please find below a communication from the Examiner in charge of Interferences in regard to the above-cited case.

Very respectfully,

F. I. Allen
Commissioner of Patents.

The preliminary statement filed by Thomas A. Edison, a junior party, failing to overcome the prima facie case made against him by the respective dates of filing applications, and Adenor N. Petit, another junior party, having failed to file a statement within the time allowed for that purpose, judgment on the record of priority of invention is hereby rendered in favor of Frank L. Capps, the senior party, in accordance with the provisions of Rules 114 and 116.

Limit of appeal will expire March 27, 1903.

M E M O R A N D U M
RE EDISON GRAMOPHONE RECORDS.

There are two interferences:

1st, Edison vs. Pettit vs. Capps, No. 22202, and,

2nd, Edison vs. Jones, No. 22,203:

(1) The issue of the first interference, Edison's preferred form of side cutting recorder (shown in Figs. 9 and 10 of the Edison drawings) having a thin lateral projecting circular edge with its periphery forming a cutting edge. On March 7th judgment was entered against Edison on the record for the reason that Edison's date of conception (December 1898) was subsequent to the filing of the Capps application (September 9, 1895). If, therefore, there is an interference between Edison and Capps, the latter would certainly prevail. The Rules provide for presenting motions to dissolve interferences by the defeated party on the record. In the present case, although Capps shows a recorder which is practically identical with that suggested by Edison, yet the Capps recorder was to be used for making phonograph and not gramophone records. In other words, all that Capps did was to take an ordinary cylindrical recorder and grind off the heel behind the cutting edge so as to make the recorder somewhat conical instead of cylindrical. The only purpose for this was to enable the recorder to cut a sharper record. Edison's idea was to produce a recorder adapted for an entirely new purpose, namely, to cut a zigzag record; such a recorder from Edison's point of view would be formed with two cutting edges, one cutting as the recorder moves in one direction and the other cutting as it moves in the other direction. From Capps' point of view, the recorder would be one provided with a single curved cutting edge. Apparently, there is no interference between these structures, and unless the issue covers

is limited to a recorder adapted for Edison's purpose, it would not define a patentable device. A motion to dissolve the interference would be advisable, if it were not for the fact that the situation in the Edison-Jones interference is such as to recommend doing nothing further with this general matter.

(2) The issue in the second interference covers broadly a recorder "provided with lateral cutting edges in line with the path of vibration." Such a claim appears to cover any recorder adapted to cut a gramophone record. Edison alleges conception in December 1898, and actual reduction to practice in January 1899. The Edison application was filed November 1901. Jones alleges conception in August 1896 and reduction to practice in August 1896, secret use until October 1898 and since the last date "many hundred such articles embodying his said invention have been made and used, and many thousand sound records produced thereby."

The Jones application was filed in May 1900. It is doubtful whether Edison could overcome the Jones application even if Jones took no testimony. Admitting that Edison's apparatus of January 1899 was a complete reduction to practice, the delay in filing the application until November 1901 would be very difficult to explain. Under recent decisions, an inventor who merely reduces an invention to practice and does nothing further with it in the way of presenting it to the public loses his rights as against a later but more diligent independent inventor. If the Edison case should be proved beyond any question, it would only be necessary for Jones to show that in October 1898 he had, as he alleges, made the invention and since continued to practice it. Proof of that sort furnished by Jones would certainly overcome any testimony which under the practice could be submitted by Edison.

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In view of these circumstances, it would seem inexpedient to do anything further with either of these cases.

April 13, 1908

Spoke to Mr. Edison today about these two interferences and he said, in view of the unfavorable situation in the Edison-Gow case, not to press them. To fight the Jones case would be to lose the Edison case, while to drop the Edison case would not only necessitate an interference with Hatch, but even if Edison got the patent, it would be an infringement on Jones.

Grand L. Apow,

Orange N. J.

**Legal Department Records
Phonograph - Interference Proceedings**

Edison v. Smith (No. 25,460)

This folder contains material pertaining to a Patent Office proceeding involving an application for a patent on a sound box or diaphragm assembly, filed by Edison on November 13, 1903, and a competing application filed by Eugene C. Smith. The selected items include Patent Office notifications, sworn statements, memoranda, and technical drawings regarding Edison's invention and application.

Report on Experiments on 'Goo' recording
fall 1903.

Mr. F. L. Dyer,

The first time I saw 'Goo' in connection with
phonograph recording was about Oct 30th 1903.
Oct 25th I started experiments of recording
with Mr. Edison's 'Goo' & under the Edison's
direction. About November 10th 1903
we commenced having results war-
ring by November 15th to have recording
department (Walter A. Miller, Meeker
Bentley, also George Verner). spent
5 or 6 times from 2 to 3 hours in
recording in room XII Laboratory.

In my possession are now, a great
many parts of experimental apparatus
such as described in my experimental
book #2. — Also a number of
drawings & sketches made by
Mr. Edison (some even signed with
his initials). (Some also counter-
signed by F. C. Burk.)

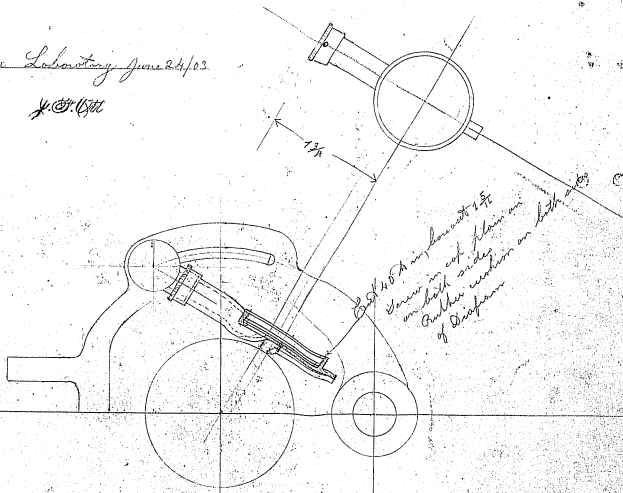
The earliest date thusly given
is hereto attached (in Mr. Edison's
writing:) Nov. 14th 1903. —

There should be a package of these
& such drawings in your department signed by
either F. C. Burk or myself previous to
this date as I remember having signed
them early at Burk's request. Wm. C. Hargreaves
Lab. Dec 5th 1903.

[ATTACHMENT]

Edison Laboratory June 24/03

J. C. Galt



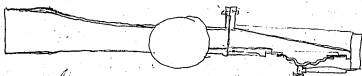
Am. Pat.
file

[ATTACHMENT]

Oct 4th 1903
J. S. Ott

Depth
60/1000
diam

Rubber ring 9/32

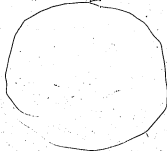


15 piece work
Tag

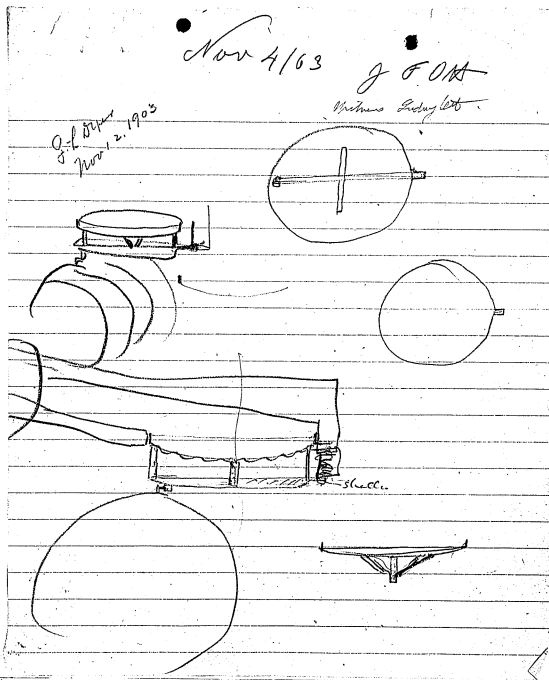
Reamed same radius
as large one -
Corrugated 2/3rds the
depth of large one



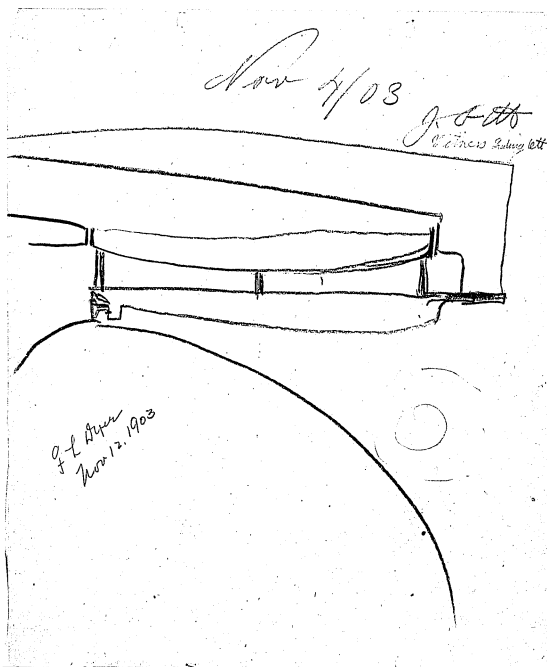
Branch L. Hoyer
Oct 9, 1903



[ATTACHMENT]



[ATTACHMENT]



[ATTACHMENT]

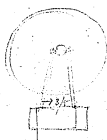
regular Nat Phon Co
Record Dept's recorders
by Nov 10 ¹⁹⁰³ we had about 12 to 18
"blank" recorders fit to be used ~~for~~
with Geo George Kerner Walter & Miller
and myself set them up - & used
them & the poorest ones are reset
many times.

December & 1/2 half of January
I set up from 150 to 200
different recorders.

After that only occasionally
did I work on Geo. Kerner's
Last date I can fix
is Feb 16th 1904.

[ATTACHMENT]

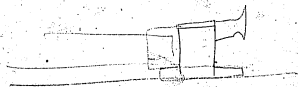
NCZ 11/03



15.23

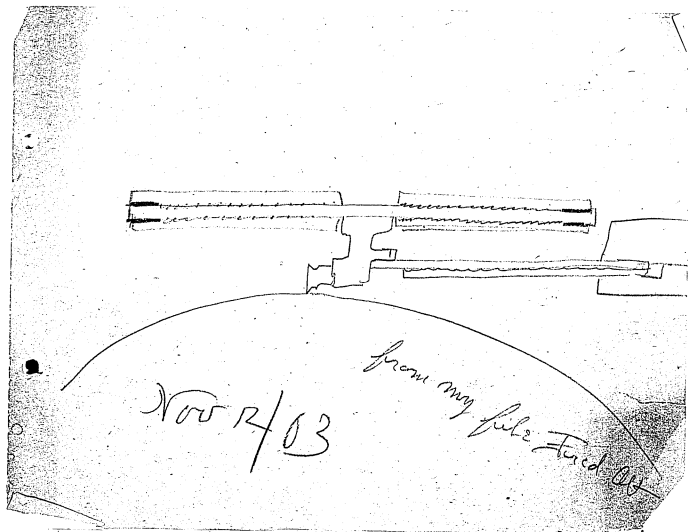
6

Nov 15/03

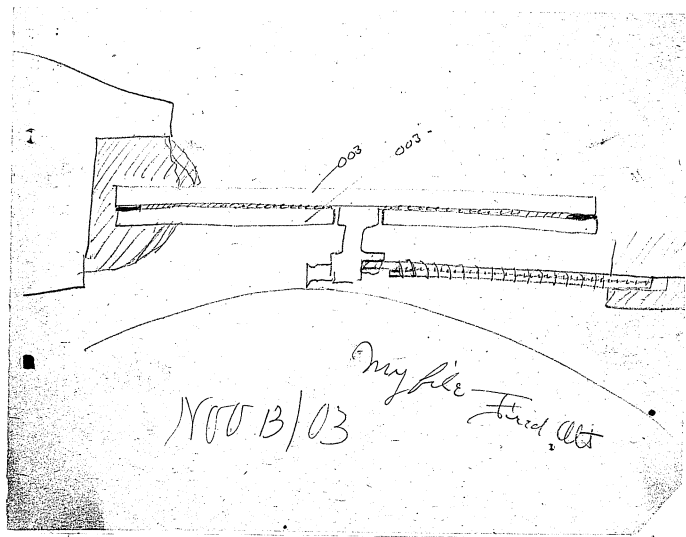


6

[ATTACHMENT]

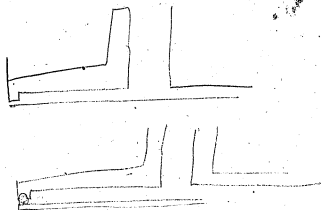


[ATTACHMENT]



[ATTACHMENT]

Nov 14 1903 - 7a2
Russia Idea



UNITED STATES PATENT OFFICE.

Thomas A. Edison, }
vs. } Interference No. 25,460.
Eugene C. Smith. }

-PRELIMINARY STATEMENT OF THOMAS A. EDISON-

State of New Jersey, }
County of Essex. } ss.:

THOMAS A. EDISON of Llewellyn Park, Orange, County of Essex, State of New Jersey, being duly sworn doth depose and say that he is a party to the interference declared by the Commissioner of Patents November 28th, 1905, between his application for Letters Patent filed November 13th, 1903, Serial No. 180,998, for Apparatus for Recording Sounds, and an application for Gramophone Sound-Boxes, filed by Eugene C. Smith of New York City; that he conceived the invention set forth in the declaration of interference on or about the 26th day of September, 1903; that between September 20th, 1903 and October 1st, 1903, he first made drawings of the invention; that between September 20th and October 1st, 1903 he first explained the invention to others, and made further disclosures of the invention to others in the month of October 1903. That between October 1st, 1903 and October 20th, 1903, he made one or more full sized phonograph recorders embodying the invention in issue, and first operated the same for the

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purpose of recording sounds on or about October 20th, 1903 at his Laboratory at Orange, Essex County, New Jersey; that since the said 20th day of October, 1903, a large number of additional full sized phonograph recorders were made embodying the invention in issue, and were put in use for recording sounds at the Edison Laboratory aforesaid; that said recorders have been used from time to time since that date; and that he never made a model of the invention as distinguished from a full sized apparatus.

Thos. A. Edison

Sworn to and subscribed before me }
this 16th day of December, 1905.)

Frank L. Dyer
Notary Public

Seal

Room No. 379
All communications should be addressed to
"The Commissioner of Patents,
Washington, D. C."

J. E. D.

DEPARTMENT OF THE INTERIOR,

U. S. PATENT OFFICE,
JUL 14 1906

United States Patent *Office*
MAILED.

Washington, D. C. July 14, 1906. 190...

In Re Interference

Edison vs. Smith

Int. F. 225,460

Before the Primary Examiner,

Division 25

Thomas A. Edison,
Care Frank L. Dyer,
Edison Laboratory,
Orange, N. J.



Please find below a communication from the Examiner in charge of Division 25 in regard to the above-cited case.

Very respectfully,

F. J. Allen
Commissioner of Patents.

This is a motion by Edison, junior party, to dissolve the above entitled interference upon the following grounds:

First, irregularity in declaring the interference.

Second, that the issue is not patentable.

Third, that Smith has no right to make the claims.

The issues are as follows:

Count 1: A sound box comprising a body, a diaphragm mounted loosely within said body and a permanent said-plastic connection applied in plastic condition to the periphery of said diaphragm and said body and permitting said diaphragm to yield radially.

Count 2: A sound box comprising a body, a diaphragm mounted loosely within said body and a permanent said-plastic rubber connection applied in plastic condition to the periphery of said diaphragm and said body and permitting said diaphragm to yield radially.

First, in regard to the patentability of the issues.

Considerable difficulty has been found in ascertaining just what some of the terms contained therein meant as read upon the references and the involved applications.

The claims were framed by the office but at the time they were framed a clear distinction between burned rubber used by Edison and rubber cement used by Smith was probably not known by the examiner.

It has been brought out at the hearing on this motion that the essential characteristic of burnt rubber is that it remains viscous practically indefinitely after its application, whereas, the rubber cement while it may possibly be denominated "plastic" when applied, the carbon bisulphide soon evaporates and leaves the practically permanent gum rubber. If this permanent gum rubber can be said to be "semi-plastic", it is no more "semi-plastic" in the sense that the burnt rubber is "semi-plastic" than is the diaphragm fastening of McDonald, #483,953 or Johnson, #691,078.

Again, the counts when analyzed are found limited to a connection for the box and diaphragm which is "plastic" when applied and which afterwards becomes permanently "semi-plastic". As now understood, Edison's connection remains indefinitely in the same condition after its application so if it is properly denominated "plastic" when applied, it would be inaccurate to denominate it "semi-plastic" in its so called permanent form. Not so, however, with Smith's connection or the connection of the Johnson or McDonald patents. In all of these, time does change their degree of plasticity. When they ^{finally} having reached their permanent form, it is difficult, probably impossible, for one to say which one best answers the limitation "semi-plastic".

Again, Smith's as "plastic" connection is applied only at the "periphery", but in Edison's case and in the patents of Johnson and McDonald, the connection extends a considerable distance inwards from the periphery.

Finally, there has been a good deal said about the diaphragm yielding radially. To obtain the best results either in a production or reproduction of a record it is only necessary that the diaphragm yield an almost infinitesimal amount and probably in case of both the applications and the patents there are ample provisions made for all necessary radial movement.

The limitation in the second count to a "rubber" connection carries with it no new function common to both the devices involved in the interference. The action of the burnt rubber of Edison is as different from the dissolved rubber of Smith as either are different from the so called wax or gum of Johnson or the cement and rubber of McDonald. Indeed, Johnson's gum from the "elastic" quality ascribed to it may have been rubber gum, but whether it was or not, its functions seem to be as close to those of Smith's device as Smith's device is to Edison's device.

It follows from what has been said above, that the issues of the issues when construed sufficiently broad to include both the devices involved in this interference, do not properly distinguish from the references and in accordance with the practice outlined in Rule 124, as amended June 15, 1906, the claims corresponding to the issue of this interference are rejected and July 30, 1906 at 3 P.M. is set for a reconsideration of this action.

In taking the above action the examiner has not overlooked the argument of Smith to the effect that inasmuch as his preliminary statement carried the date of conception of the invention back of the references, that this interference should not be dissolved in view of *Foraythe vs Richards*, 115 C.C., 1327. That decision, however, was based upon a state of facts very different from the facts in the present case. In *Foraythe vs Richards*, one of the parties had by oath under Rule 78 ante dated the references and the other party had in his preliminary statement given a date of conception ante dating the references. In the present case Edison has not ante dated the reference and from his preliminary statement it appears that he cannot ante date them so that if the issues are not patentable

#23,460-----4.

the question of priority becomes a moot question, even though Smith may ante date the references, this being true, if the issues are not patentable to Edison, this interference should be dissolved.

Second, as to the irregularity. Edison contends that the counts being for an article, should not define said article by its method of manufacture, the objectionable clause being a "permanent semi-plastic connection applied in plastic condition".

While it is true that as a rule an article should not be defined by its method of manufacture, the examiner does not know how else the particular article in this case could be defined, this being true, it may constitute an exception to the general rule and be permissible.

It must be held, therefore, that there is no such irregularity as would preclude a proper determination of the question of priority and the motion to dissolve on this ground must be denied, and limit of appeal from this branch of the decision is set to expire Aug. 14, 1906.

3rd, as to Smith's right to make the claim. Herundquist-ly discloses the issue except as to the term "semi-plastic" when applied to his permanent connection. This term seems to be broad enough to cover a connection between the solid and the plastic as well as between the plastic and the liquid and is ^{probably} ~~clearly~~ readable therefore, upon the Smith disclosure.

It must be held, therefore, that Smith has a right to make the claims constituting the counts of the interference and from this branch of the decision no appeal can be taken.

H.

Room No. 379
All communications should be addressed to
"The Commissioner of Patents,
Washington, D. C."

J.H.D.

DEPARTMENT OF THE INTERIOR

U. S. PATENT OFFICE
OCT 4 1906

MAILED

United States Patent Office

Washington, D. C. October 4, 1906

In Re Interference

Edison vs Smith

\$25,460

Before the Primary Examiner.

Division 23

Thomas A. Edison,
Care Frank L. Dyer,
Edison Laboratory,
Orange, N.J.



Please find below a communication from the Examiner in charge of Division 23 in regard to the above-cited case.

Very respectfully,

F. J. Allen
Commissioner of Patents

This is a re-hearing, as provided under amended Rule 124, of the examiner's decision rendered in this interference July 14, 1906, rejecting the claims of both applicants corresponding to the counts of the issue; that decision, however, upon careful reconsideration is believed to be correct and is repeated and the claims are finally rejected. Smith seems to be laboring under the impression that if the examiner finally rejects these claims, he will not be given the opportunity to antedate certain of the references as provided in Rule 75. In this he is mistaken. In the recent decision, *Sanders vs Hawthorne vs Hoyt*, dated Sept. 18, 1906, the Hon. Commissioner has held in effect that in final rejections of the character of the one above, that applicants will be given the opportunity upon the dissolution of the interference to file amendments to the finally rejected claims or any other amendment that the nature of the case requires. In accordance with this decision Smith will be given

#25,460-----2.

the right after the dissolution of the interference to file the necessary affidavit under rule 75, and the above final rejection of his claims are based upon the ground that his preliminary statement is not of such a character as it can be accepted in lieu of an affidavit under rule 75.

In the decision of the Hon. Commissioner above cited, it was held that rule 109, as amended June 12, 1906, forbidding the entry of amendments while the cases were in interference, except as provided for, and certain other rules, is binding. Said affidavit under rule 75, therefore, cannot be entered in this case or considered at all after the interference shall have been dissolved ^{until}.

Limit of appeal from this decision will expire October 20, 1906.

N.

**Legal Department Records
Phonograph - Interference Proceedings**

Edison v. Macdonald (No. 25,677)

This folder contains material pertaining to a Patent Office proceeding involving an application for a patent on an amplification device, filed by Edison on September 15, 1905, and a competing application filed by Thomas H. Macdonald. The selected items consist of Edison's testimony and exhibits, the brief for Edison, and the Patent Office decision. Edison's subsequent brief on appeal has not been selected.

BOX No. 58

Legal Box 117
Frank L. Dyer

United States Patent Office.

EDISON
vs.
MACDONALD.

INTERFERENCE
No. 25,677.

EDISON'S TESTIMONY AND PAPER
EXHIBITS.

FRANK L. DYER,
For Edison.

O. G. Burgoynes, Writer and Control Systems, N. Y.

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UNITED STATES PATENT OFFICE.

EDISON

VS.

MACDONALD.

Interference
No. 25,577.

Issue.

COUNT 1. In a phonic apparatus, the combination of a phonographic recording surface, means for rotating said surface, a carrier movable across said surface, a phonographic stylus and friction wheel carried by the carrier, a friction member connected to said stylus and pressing against the friction wheel, and means representative of sound vibrations for varying the friction between said friction member and friction wheel.

COUNT 2. In a phonic apparatus, the combination of a traveling carriage, a friction wheel and phonographic stylus carried thereby, a friction member pressing on said wheel and connected to said stylus, means for driving said friction wheel and means representative of sound vibrations for varying the amount of friction between the friction member and friction wheel.

COUNT 3. In a phonic apparatus, the combination of a rotating member, a carriage movable longitudinally thereof, a phonographic stylus and friction wheel carried by the carriage, a friction member pressing on said friction wheel and connected to said stylus, and com-

most driving means for moving the carriage and rotating the friction wheel.

Court 4. In a phonic apparatus, the combination of a rotating mandrel, a carriage movable longitudinally thereof, a phonographic stylus and friction wheel carried by the carriage, a friction member pressing on said friction wheel and connected to said stylus, common driving means for moving the carriage and rotating the friction wheel, and means representative of sound vibrations for varying the friction between the friction member and friction wheel.

UNITED STATES PATENT OFFICE.

THOMAS A. EDISON

VS.

THOMAS H. MACDONALD.

Interference
No. 25,677.**Preliminary Statement of Thomas A. Edison.**

STATE OF NEW JERSEY, }
County of Essex, } ss.:

THOMAS A. EDISON, of Liswellyn Park, Orange, in the County of Essex and State of New Jersey, being duly sworn, doth depose and say that he is a party of the interference declared by the Commissioner of Patents February 6th, 1906, between his application for letters patent filed September 15th, 1905, serial No. 278,549 for receiving telephones, and an application filed by Thomas H. Macdonald for phonic apparatus referred to therein; that he conceived the invention contained in claims 3, 4, 5 and 6 of his said application Serial No. 278,549 during the month of April, 1902; that during the month of April, 1902, he made a number of experiments for the purpose of demonstrating, and did demonstrate, the operativeness and utility of the said invention; that during the month of April, 1902, he made sketches of the invention, and at that time first explained the invention to others; that in the month of May, 1902, full sized working drawings of the invention were made; that on May 31st, 1902, the construction of a full sized apparatus

embodying the said invention was commenced, and said full sized apparatus was completed in the month of June, 1902; that he made no other apparatus embodying the invention, nor was any model of the same constructed.

THOMAS A. EDISON.

Subscribed and sworn to before me this 28th day of February, 1906.

[SEAL.]

FRANK L. DYER,
Notary Public.

UNITED STATES PATENT OFFICE.

THOMAS A. EDISON

vs.

THOMAS H. MACDONALD.

Interference
No. 35,677.

MESSES. MAURO, CAMERON, LEWIS & MARSH,
620 F Street, Washington, D. C.

GENTLEMEN:—You are hereby notified that on Tuesday, July 24, 1906, at my office, Edison Laboratory, West Orange, New Jersey, at 10:30 in the forenoon, I shall proceed to take the testimony of Thomas A. Edison, Frederick P. Ott, John F. Ott, and John F. Randolph, all of West Orange, New Jersey, and possibly others, as witnesses in behalf of Thomas A. Edison. The examination will continue from day to day until completed. You are invited to attend and cross-examine.

Very respectfully,
FRANK L. DYER,
Attorney for Edison.

Dated Orange, N. J., July 13, 1906.

Timely service of the above notice accepted this 16th day of July, 1906.

MAURO, CAMERON, LEWIS & MARSH,
Attorneys for Macdonald.

UNITED STATES PATENT OFFICE.

THOMAS A. EDISON

vs.

THOMAS H. MACDONALD.

Interference
No. 25,677.

Testimony on behalf of Thomas A. Edison taken at the Edison Laboratory, West Orange, N. J., commencing Tuesday July 24, 1906, at 10:30 A. M., before HENRY W. KNIGHT, Esq., a Master in Chancery of New Jersey and Special Examiner by consent, pursuant to the annexed notice.

Present—

FRANK L. DYER, Esq., for Thomas A. Edison.
C. A. L. MARRIS, Esq., for Thomas H. Macdonald.

Ludwig F. Ott.

LUDWIG F. OTT, a witness produced on behalf of Thomas A. Edison, being first duly sworn and asked questions by Mr. DYER, deposes as follows:

Q. 1. Give your name, age, residence and occupation.

A. My name is Ludwig F. Ott; I am 24 years of age, residing at 176 High Street, Orange, N. J. My occupation is making experiments.

Q. 2. Are you employed by Mr. Edison?

A. Yes, sir.

Q. 3. When did you leave school?

A. I left school in 1902, I graduated in that year.

Q. 4. Prior to leaving school did you ever do any experimental work in the Edison laboratory?

A. I did experimental work at the Edison laboratory during summer vacations prior to leaving school.

Q. 5. Before leaving school did you ever do any experimental work at the Edison laboratory in connection with schemes for recording telephone messages with phonographs?

A. Yes, sir.

Q. 6. Do you recall when that was?

A. I could not recall exactly but it was prior to 1902.

Q. 7. What did the experiments you have referred to consist of?

A. The experiments consisted of a phonograph in one room which had attached to it a telephone transmitter and another phonograph in another room having attached to it a telephone receiver; simply connected the telephone receiver and the transmitter to a regular phonograph speaker on one end and a recorder on the other, and then we had a battery and coil interposed between the two instruments, also a magnetic arrangement for releasing the governor on both machines simultaneously when the telephone was started. We had a separate battery and line for operating the magnetic starting device of both machines.

Q. 8. What was the idea of this experiment?

A. The main idea was to use it in telegraphing, substituting the telephone for a telegraph in railroad stations so that there would be no mistake in the messages received and a record of them could be kept.

Q. 9. I call your attention to number of pieces of apparatus in this room and ask you if you find here the machines with which you experimented prior to the year 1902?

A. There are two machines here which I experimented with, one is the telephone transmitter and the other is the later style of recorder.

Q. 10. Please point out the transmitting instrument?

A. The transmitting instrument is the one to the right.

The machine referred to by the witness is offered in evidence and marked, "Edison's Exhibit, First Transmitter."

Q. 11. Please consider this machine a little more in detail than you have done and describe its construction and operation.

A. The machine consists of an ordinary Standard phonograph equipped with the usual reproducer and over this reproducer is mounted a common form of carbon telephone transmitter. The phonograph is operated by a spring motor, and a magnet is used in a separate circuit for starting and stopping the motor. In operating this particular machine I placed a phonograph record on the mandrel so that when the phonograph was started the phonograph reproducer would speak into the telephone and the record thereby be transmitted over the line. I used all sorts of records in these experiments, both musical and talking.

Q. 12. Please point out the receiving instrument?

A. The receiving instrument is the one to the left.

The machine last referred to by the witness is offered in evidence and marked "Edison's Exhibit, First Receiver."

Q. 13. Please also describe this machine?

A. The receiving instrument is a similar phonograph to that used with the transmitter except that it was provided with an ordinary recorder adapted to make a record on a blank cylinder; the magnetic device is also employed for starting and stopping the motor. At first I used an ordinary telephone receiver which was mounted over the recorder so that when the message was received over the line it would be delivered to the

diaphragm of the recorder and thereby make a record, but I found that such a record was very faint and at Mr. Edison's suggestion therefore the form of receiver at present on the machine was constructed. With this receiver the diaphragm, which was vibrated by the receiving magnet, was connected directly with the revolving stylus of the phonograph so that there was less opportunity for mechanical loss and consequently the records made were considerably louder. The diaphragm used with this receiver is a steel or iron diaphragm like the ordinary diaphragm of a telephone receiver.

Q. 14. Do I understand that these experiments were made by you prior to or after the year 1902?

A. I think they were made prior to the year 1902.

Q. 15. That was before you left school?

A. Before I left school. Yes, they were, before I left school.

Q. 16. And with the machines exactly as they are now constructed, prior to that time?

A. The same construction and the same machine.

Q. 17. How successful were the experiments which you made with these machines?

A. With the first form of recorder we were able to distinguish the words by means of an ear tube; with the second form of recorder, which is the one now on the machine, we were able to distinguish the words by means of a horn, showing that they were very much louder.

Q. 18. In a statement which I propose to subsequently introduce, taken from the books of the Edison Laboratory, it appears that in connection with experiment number 1148 entitled "Railway telephone experiments for block signals," you were employed on that experiment in the months of July and August of 1901. Did you do any other experimenting on the use of telephones for railway block signals other than in connection with the two machines which have been

introduced in evidence and to which you have previously referred?

Question objected to as incompetent and without having sufficient foundation.

A. I did not experiment on other machines further than setting up a line to connect the reproducing instrument with a chalk telephone; but this was later than the experiments which I made with the two machines which have been introduced as exhibits.

Counsel for Macdonald objects to the entire deposition of this witness as irrelevant and immaterial and gives notice of a motion to suppress the same.

He further objects to the two exhibits, as irrelevant, immaterial and not sufficiently proved. No cross-examination.

(By consent the signature was waived).

John F. Ott.

John F. Ott, a witness produced on behalf of Thomas A. Edison being first duly sworn and asked questions by Mr. Dyer deposes as follows:

Q. 1. State your name, age, residence and occupation?

A. My name is John F. Ott, I am fifty six years old, I reside at 75 High Street, Orange, N. J., and my occupation is that of Superintendent of the Edison Laboratory.

Q. 2. How long have you been connected with Mr. Edison?

A. Since 1869.

Q. 3. What are your duties in the Edison Laboratory?

A. Getting out such sketches or designs as Mr. Edison gives us; seeing that proper drawings are made of them and that they are given to the workmen to work out.

Q. 4. Your work is to supervise the manufacture of experimental apparatus?

A. That is it.

Q. 5. I call your attention to a machine that has been offered in evidence and marked "Edison Exhibit, First Transmitter" and ask you if you had anything to do with its construction?

A. Yes, I had.

Q. 6. Was this machine constructed under your direction?

A. Yes, sir.

Q. 7. Do you know the purpose of this machine?

A. The purpose of this machine is to transmit a message from a phonograph record to a telephone transmitter in connection with the system of railroad signaling that Mr. Edison was working on.

Q. 8. I call your attention to another machine which has been offered in evidence and marked as an exhibit in this case ("Edison's Exhibit, First Receiver") and ask you if you had anything to do with the construction of this machine?

A. Yes, sir.

Q. 9. Was this machine constructed under your direction?

A. Yes, sir.

Q. 10. What was its purpose?

A. The purpose of this machine is to record on a blank cylinder, messages transmitted over the line from the other machine "Edison's Exhibit, First Transmitter."

Q. 11. Did you witness the experiments with these two machines concerning which you have just testified?

A. Part of them.

Q. 12. Please tell what you remember about the experiments?

A. The wire ran from one room into another, one instrument was set up in one room and the other in the other room and we transmitted messages across, from the transmitter to the receiver.

Q. 13. Do you know what the purpose was of transmitting a telephone message and recording it on the phonograph blank so as to form a permanent record?

A. The purpose was that in block signaling or freight orders the message could be given over the telephone and a record made of it which could be kept as a permanent record.

Q. 14. I call your attention to a piece of apparatus and ask you to tell what it is, and if you had anything to do with its construction?

A. This is a receiver with two chalks and one diaphragm, so as to increase the volume of sound. I made this machine.

Q. 15. By "receiver" do you mean telephone receiver?

A. Yes, telephone receiver.

The instrument last referred to by the witness is offered in evidence and marked "Edison's Exhibit, First Chalk Receiver."

Objected to as irrelevant and immaterial and not sufficiently proved.

Q. 16. Can you produce a sketch from which "Edison's Exhibit, First Chalk Receiver" was made?

A. Yes, sir; I produce Mr. Edison's original sketch.

Q. 17. On what portion of this sketch is the double chalk receiver illustrated?

A. On the top of the sheet.

Q. 18. I notice on this sketch the words "John—make these"; in whose handwriting are those words?

A. Mr. Edison's.

Q. 19. To whom is the note addressed?

A. To me.

Q. 20. On this sketch I have made certain repre-

sentative letters in ink and I will ask you to kindly refer to the same and tell me what they relate to?

A. The letter *a* is the diaphragm, the letters *bb* are the two chalk cylinders, the letters *cc* are the connections of the chalk cylinders, and the letters *ddd* are the metallic springs connected to the diaphragm and which rest on the chalk.

Q. 21. Is this general scheme of making a telephone receiver by causing an electrode to press upon a rotating chalk cylinder in such a way that the electrical impulses will vary the friction between the electrode and the chalk cylinder, a new suggestion in recent years?

Objected to as leading.

A. No; that is the ordinary chalk receiver or motograph that Mr. Edison invented in the seventies.

Q. 22. I observe on this same sketch the drawing of another device in which a single chalk cylinder was used. What was this apparatus?

A. It is similar to the one above only it has a single chalk cylinder.

Q. 23. I notice on this sketch the impression by a rubber stamp of the name "J. F. Ott"; did you make that impression on the sketch?

A. I stamped that on.

Q. 24. Is it your custom to stamp your names on sketches handed to you by Mr. Edison?

A. Yes, sir.

Q. 25. Does your handwriting appear anywhere upon this sketch?

A. Yes, sir; the date.

Q. 26. What is that date?

A. May, 1902.

Q. 27. What is your custom in reference to dating of sketches?

A. So that we know when the sketches are handed in to us and have a record of them.

Q. 28. Are you able to say that this sketch was in your possession in May, 1902?

A. Yes, sir.

Q. 29. Are you able to say whether, except for the stamped impression and date on this sketch, the drawing and handwriting thereon were made by Mr. Edison?

A. Yes, sir; they were made by Mr. Edison.

The sketch referred to by witness is offered in evidence and marked "Edison's Exhibit, Sketch of Chalk Receiver."

Exhibit objected to as irrelevant and immaterial.

Q. 30. Did you ever make a chalk receiver or motor-graph with one chalk cylinder similar to the drawing in the centre of the sheet, "Edison's Exhibit, Sketch of Chalk Receivers"?

A. I did.

Q. 31. Please produce the same?

A. This is the machine.

Q. 32. How does this machine differ from "Edison's Exhibit, First Chalk Receiver"?

A. It is made with a smaller chalk and smaller diaphragm, and only a single chalk is used. We afterwards found that the smaller diaphragms were more sensitive to faint articulations than the larger diaphragms; that is to say, it would bring them out sharper.

The chalk receiver last referred to by the witness is offered in evidence and marked "Edison's Exhibit, Second Chalk Receiver."

Exhibit objected to as irrelevant and immaterial.

Q. 33. Did you have anything to do with the construction of the two chalk receivers which have been introduced as exhibits herein as "Edison's Exhibit,

First Chalk Receiver" and "Edison's Exhibit, Second Chalk Receiver"?

A. Yes, sir; they were built under my direction.

Q. 34. Can you state when those two chalk receivers were constructed under your directions?

A. It was about the time of the date of "Edison's Exhibit, Sketch of Chalk Receiver," namely, May, 1902.

Q. 35. Were the two machines, "Edison's Exhibit, First Transmitter" and "Edison's Exhibit, First Receiver," constructed before or after the two chalk receivers?

A. That I cannot remember; it was about the same time; they were very close together.

Q. 36. I have marked on the central figure of "Edison's Exhibit, Sketch of Chalk Receiver" some reference letters in red ink and I will ask you to please state what those letters refer to?

A. The letter *a* is the diaphragm; letter *b* is the chalk cylinder; letter *c* is the electrode pressing upon the chalk cylinder; the letter *d* is a rubber cushion for regulating the friction between the electrodes and the chalk cylinder, and the letter *e* is an adjusting screw for varying the pressure of the elastic cushion *d*.

Q. 37. On the general subject of recording telephone messages with phonographs did you ever construct for Mr. Edison, or have constructed under your direction for him, any other machine for that purpose than "Edison's Exhibit, First Transmitter"?

A. Yes, sir; I constructed a large machine for that purpose.

Q. 38. Please produce that machine.

A. Here is the original machine.

Q. 39. Please describe this machine briefly and explain its general operations?

A. It is a phonograph driven by an electric motor of the type called the Concert phonograph and having a recorder that is operated with the chalk, the chalk being rotated by an arm extending out on another

drum mounted upon the same shaft as the cylinder, having thereon a little friction roller that rotates the chalk through a little worm and worm gear.

Q. 40. When was this machine built?

A. About May, 1902, as near as I now remember.

Q. 41. Do you remember who worked on this machine, that is, who did the actual practical work?

A. If I am not mistaken I think it was Hoffmeyer.

Q. 41½. Are you able to state how much time was expended on this machine, how long it took to finish it after it was started?

A. That can be found on the time sheets, but I do not remember.

The machine last referred to by the witness is offered in evidence and marked "Edison's Exhibit, Recording Telephone."

Exhibit objected to as irrelevant and immaterial, and as not sufficiently proven.

Q. 42. Can you produce any sketches illustrating the particular arrangement of driving mechanism disclosed in "Edison's Exhibit, Recording Telephone", wherein a friction wheel is rotated by an auxiliary drum and communicates movement through worm gearing to the chalk cylinder?

A. Yes; these are sketches made by Mr. Edison and they are correct (producing sketches).

Q. 43. On the smaller of those sketches I observe certain writing and dates, together with the impression of a rubber stamp; is this your handwriting?

A. It is, and I applied the stamp of my name.

Q. 44. What does the date, May 29, '02, on this sketch indicate?

A. It indicates the date when I signed the sketch.

Q. 45. Kindly explain the elements of the device shown in the smaller sketch by reference to the letters in red ink which I have placed thereon.

A. The letter *a* represents the ordinary mandrel on

which the blank is placed, the letter *b* is the auxiliary cylinder carried on the mandrel shaft, *c* is the friction roller bearing on the auxiliary cylinder *b* and driven therefrom; the friction roller *c* drives the worm *d* which engages the worm gear *e*; the worm gear *e* drives the shaft *f* on which is mounted the chalk cylinder *g*; engaging with the chalk cylinder is an electrode *h* which is connected with the diaphragm *i* of the recording apparatus. The sketch illustrates the idea of driving the chalk cylinder of an ordinary motograph through the same power that rotates the mandrel. The motograph operates the recording stylus so as to make a permanent record on the blank.

The words "This sketch illustrates" at the close of the answer and the remainder of the answer are objected to as volunteered and incompetent.

Q. 46. Do you recall whether you signed this sketch on the same date that you received it or not?

A. That I cannot say.

Q. 47. The sketch then may have been in the office for some time previous to May 29, 1902?

A. Yes, sir.

The sketch to which the witness last testified is offered in evidence and marked "Edison's Exhibit, Recording Telephone Sketch No. 1."

Exhibit objected to as irrelevant and immaterial and as not sufficiently proven.

Q. 48. Having reference to the larger of the two sketches which you have produced, is the writing thereon and the date in your handwriting or not?

A. That is in my handwriting.

Q. 49. What does the date indicate?

A. May 29th, 1902; I always signed the sketches, either the day I received them or the day following.

Q. 50. As I understand then, this sketch was in your possession at least as early as May 29th, 1902?

A. Yes, sir.

Q. 51. I will ask you to explain the parts of this sketch by reference to the letters in red ink which I have placed thereon?

A. This is the same machine that is illustrated in the sketch I have just produced. The mandrel *a* carries the phonograph blank on which a permanent record is to be made, *b* is the auxiliary cylinder with which engages the friction roller *c*; this friction roller drives the shaft *d*, on the end of which is mounted a worm *e*; the latter engages with a worm gear *f* on the shaft *g* and rotates the chalk cylinder *h*; *i* is the diaphragm to which is connected the electrode *j* bearing against the chalk roller *h*; the arm *k* offers a support for the shaft *g*; *l* is the usual phonograph arm which carries the recording and reproducing mechanism and which is fed longitudinally of the blank or record; as the recording mechanism feeds longitudinally, the friction roller *c* will be fed longitudinally of the auxiliary cylinder *b*; *m* is the recording stylus which engages the blank so as to form a permanent record.

The larger sketch just referred to by witness is offered in evidence and marked "Edison's Exhibit Recording Telephone Sketch No. 2."

Exhibit objected to as irrelevant, immaterial and not sufficiently proved.

Q. 52. Can you produce any sketch of Mr. Edison's illustrating more in detail than the two sketches last referred to do, the connections between the motograph or chalk receiver and the phonograph recording mechanism?

A. Yes, here is one of Mr. Edison's sketches.

Q. 53. Is the date, May, 1902, on this sketch in your handwriting?

A. Yes, sir.

Q. 54. Does that date indicate when the sketch was received or dated by you?

A. Yes, it was dated by me in May, 1902.

Q. 55. I will ask you to kindly explain this sketch by reference to the letters that I have placed thereon in red ink?

A. Letter *a* indicates the body of the recorder carrying the diaphragm *b* and to which is pivoted the ordinary floating weight *c*; a small stylus lever *d* is mounted on the floating weight in the usual way and is connected by a link *e* to diaphragm *b*; at the forward end of the stylus lever *d* is the usual recording stylus *f* made of sapphire; mounted above the diaphragm *b* is a second diaphragm *g*, there being a space of about one-eighth of an inch between the two diaphragms. The fraction "1/8" on the sketch is in Mr. Edison's handwriting as a guide to me in spacing those diaphragms. Connected with the diaphragm *g* is an electrode spring *h* carrying a metallic button *i* near its upper end which bears on the chalk roller *j*; the chalk roller *j*, button *i*, electrode spring *h* and diaphragm *g* constitute an ordinary motograph or chalk receiver, the arrangement being such that vibrations communicated to the diaphragm *g* will be transmitted to the diaphragm *b* and thereby recorded on the blank.

Sketch last referred to by witness offered in evidence and marked "Edison's Exhibit, Recording Telephone Sketch No. 3."

Exhibit objected to as irrelevant, immaterial and not sufficiently proved.

Q. 56. Have you any book or other record from which you can ascertain definitely when the work was started on "Edison's Exhibit, Recording Telephone."

A. Yes, I find from my order book that the number of this job was 1983, and that work was started on the machine on May 29, 1902.

The order book referred to by the witness is offered to counsel for Macdonald for purposes of cross-examination.

Last answer objected to as incompetent.

Q. 57. In starting work on a machine of this sort what is the practice in the Laboratory regarding the number of the job; or, in the present case who gave this particular machine the job number 1283?

A. I did; we give every job a number so that the workmen working upon it will only have to carry a number on their time sheets, and oftentimes do not know what they are working upon, because it has only a number.

Q. 58. Please read on the record the entry in your order book relating to this particular order.

A. The entry is as follows: "1283. Recording telephone. May 29, 1902." This appears on page 12 of my order book.

Q. 59. Can you produce any notes from Mr. Edison relating to phonograph experiments in connection with the recording telephone?

A. Yes, sir; I produced two of Mr. Edison's notes on that subject.

Q. 60. Having reference to the shorter of these notes, in whose handwriting is it, exclusive of the date?

A. Mr. Edison's.

Q. 61. How long have you been familiar with Mr. Edison's handwriting?

A. Since 1890.

Q. 62. Have you ever seen him write?

A. Yes, sir.

Q. 63. In whose handwriting is the date on this note?

A. My handwriting.

Q. 64. And what does this date, May, 1902, indicate?

A. The month when I received the note.

Q. 65. What does Mr. Edison mean in this note by the expression "Motograph pens"?

A. The motograph pen is a little pen or metallic piece that bears on the chalk that is shown at "j" in "Edison's Exhibit, Recording Telephone Sketch No. 3."

The note in Mr. Edison's handwriting last referred to by the witness is offered in evidence and marked "Edison Exhibit Note No. 1."

Exhibit objected to as irrelevant and immaterial and not sufficiently proved.

Q. 66. In reference to the second of these notes, in whose handwriting is it?

A. It is in Mr. Edison's handwriting, except the date, which is my handwriting.

Q. 67. Does the date, May 1902, on this note indicate when you received it?

A. Yes, sir.

Q. 68. Can you state generally what this note refers to?

A. This refers to making different kinds of chalk cylinders or cylinders of different substances, for the motograph.

The note last referred to by the witness is offered in evidence and marked "Edison's Exhibit, Note No. 2."

Exhibit objected to as irrelevant and immaterial and as not sufficiently proved.

CROSS-EXAMINATION BY MR. MANSIE

x-Q. 69. Is it not a fact that you cannot fix the date of these various exhibits except from the dates of the notes and memoranda that have been shown you, and your books?

A. As I have so many experiments on hand the year

round, it is utterly impossible to carry any one particular date in my mind for that length of time, so that I have to rely on sketches and note books.

x-Q. 70. Have you had anything to do with any experiments in the Edison Laboratory regarding any other recording telephone besides the one referred to in these sketches and in your testimony?

A. Not under that name, although the Edison Exhibit "First Transmitter" and "First Receiver," is a recording telephone.

x-Q. 71. Besides these particular exhibits introduced in this case, have you had anything to do with any other recording telephone in the Edison laboratory?

A. Not that I recollect.

x-Q. 72. I do not understand whether "Edison's Exhibit First Chalk Receiver" has one diaphragm or two?

A. It has one.

x-Q. 73. What is the purpose of the crank handle on this same exhibit?

A. For driving the two chalks; rotating the two chalks.

x-Q. 74. Does this exhibit show any device for the rotation of the chalk other than by hand?

A. No, sir; it does not.

x-Q. 75. When you were first asked about "Edison's Exhibit First Transmitter" and "Edison's Exhibit First Receiver," did you have some uncertainty as to which was the transmitter and which device was the receiver?

A. I have not very good eyesight and of course could not see without inspecting them thoroughly; I could not tell for the moment which was which.

x-Q. 76. Did you see Mr. Edison make the sketches "Edison's Exhibit Recording Telephone Sketch No. 1," "Edison's Exhibit Recording Telephone Sketch No. 2," and "Edison's Exhibit Recording Telephone Sketch No. 3"?

A. These sketches were not always made in my

presence, but were brought into my room by him, his room being the next adjoining room.

x-Q. 77. When did you see these sketches last before to-day?

A. I could not state when I did see them last.

Counsel for Macdonald renounces the objections to the various exhibits and objects to this entire deposition as irrelevant and immaterial.
(The signature is waived).

John F. Randolph.

It is hereby stipulated and agreed between counsel that if John F. Randolph were regularly called and sworn as a witness on behalf of Thomas A. Edison he would testify as follows:

That he has been employed by Mr. Edison for more than 25 years past, during which time he had charge of the account books of the Edison Laboratory; that he has made extracts from the account books showing charges against experiment number 1233 and the same is herewith presented. That the items charged against this experiment commenced in May, 1902, and ended in December, 1902; that the total cost of the work amounted to \$462.17. That a charge for the first actual mechanical work was entered for week ending June 4, 1902, amounting to \$57.67; for the week ending June 11, 1902, \$54.25; for the week ending June 18, 1902, \$54.38; for the week ending June 25, 1902, \$71.18; for the week ending July 2, 1902, \$20; for the week ending July 9, 1902, \$11.67; and for the week ending July 30, 1902, \$4.05. That after July 30, 1902, no charges were entered on the book against this work until October, 1902, when the books showed that V. A.

Warren spent a week in experiments on this work at a charge of \$12 and that for the week ending December 19, 1902, Ludwig Ott spent ten hours on the work at a cost of \$1.60.

(The statement referred to in the above stipulated testimony is offered in evidence and marked "Edison's Exhibit, Book Extracts.")

That he has made extracts from the account books, showing charges against experiment No. 1148, referred to in the deposition of Ludwig F. Ott, and the same is herewith presented. That the items charged against this experiment commenced in July, 1901, and ended in September, 1901, and that the total cost of the work amounted to \$197.09; that the abbreviation "Std Phones less reproducers" in said statement under date of August 29th, 1901, indicates two Standard phonographs, and that the abbreviation "deld 8/3" indicates the delivery of said phonographs by the Edison Phonograph Works to the Edison Laboratory on August 3, 1901.

(The statement last referred to is offered in evidence and marked "Edison's Exhibit Extracts—Experiment No. 1148.")

Counsel for Macdonald waives the production of the books themselves and admits the statements in list thereof but objects to the same as irrelevant and immaterial and as incompetent to prove anything in this interference.

Frank L. Dyer.

FRANK L. DYER, having been first duly sworn as a witness on behalf of Thomas A. Edison, deposes and says as follows:

I am attorney for Mr. Edison in this interference and have acted as his attorney in patent matters con-

tinuously since 1897. I find that upon referring to my personal diary, which I have kept continuously since 1899, that on May 9, 1902, I visited the Edison Laboratory and there witnessed an experiment by Mr. Edison in connection with recording telephones. The experiment was conducted in what is called the Galvanometer Room of the Laboratory, which is one of the outbuildings consisting of a long main room and two ante-rooms. Mr. Edison was seated at a table in one of the ante-rooms and had before him the machine introduced herein as "Edison's Exhibit, Second Chalk Receiver," which I recognized as an ordinary photograph. This receiver was connected with a transmitting instrument in the main room. A pair of ordinary phonograph listening tubes were connected with the receiver and upon turning the crank the message from the transmitting apparatus was received.

I do not recall so vividly the character of the transmitting instrument, but I am reasonably certain that the instrument used was the machine produced herein as "Edison's Exhibit, First Transmitter."

The deposition of the witness is objected to as irrelevant and immaterial, and counsel for Macdonald particularly objects to the term "ordinary photograph" as misleading and without any understanding in the art.

No cross-examination.

(Signature waived.)

In view of imperative engagements of counsel for both parties, and of Mr. Edison, it is stipulated and agreed that Edison's time for closing his *prima facie* proofs be extended to September 15, 1906, other times to be extended accordingly.

Adjourned subject to notice.

UNITED STATES PATENT OFFICE.

THOMAS A. EDISON

vs.

THOMAS H. MACDONALD.

Interference
No. 25,677.EDISON LABORATORY, ORANGE, N. J.,
Tuesday, September 25, 1906.

Met pursuant to agreement.

Present—

FRANK L. DYER, Esq., for Thomas A. Edison.
C. A. L. MARSH, Esq., for Thomas H. Macdonald.

Thomas A. Edison.

THOMAS A. EDISON being produced on his own behalf and first duly sworn, and asked questions by Mr. Dyer, deposes as follows:

Q. 1. State your name, age, residence and occupation?

A. My name is Thomas A. Edison; I am fifty-nine years of age and reside at Llewellyn Park, Orange, N. J.; by occupation I am an inventor.

Q. 2. I call your attention to a piece of experimental apparatus and ask you if you ever saw it before?

A. Yes.

Q. 3. What is it?

A. This instrument is a phonograph equipped with a reproducer and connected to the producer is a telephone, whereby sounds from the phonograph are transmitted to the telephone over the wire.

Q. 4. What was the purpose of this apparatus?

A. It is one of the parts of a system of recording telephonic speech and sounds.

The apparatus referred to by the witness is "Edison's Exhibit, First Transmitter."

Q. 5. I call your attention to another piece of experimental apparatus and ask you if you can identify the same?

A. Yes, it is another part of the same scheme.

Q. 6. What was this apparatus used for?

A. For transmitting the recorded speech over a telephone. This apparatus is the recording part, for recording the telephonic signals on the phonograph.

The apparatus last referred to by the witness is "Edison's Exhibit, First Receiver."

Q. 7. What commercial use, if any, did you expect to make of this apparatus?

A. The endeavor to produce a recording telephone arose from the desire on the part of some of the railroad telegraph superintendents to have a system whereby they could change over from the telegraph to the telephone, but they did not want to change unless they had some means of recording all of the conversation on the wire and it was from talking with these superintendents at one of their conventions that I undertook to try to solve the problem.

Q. 8. How long have you had in mind the combination of a telephone with a phonograph so as to make a permanent record of a telephonic message?

A. A great many years, ever since the invention of the phonograph.

Q. 9. Who experimented as you now remember with the two pieces of apparatus "Edison's Exhibit, First Receiver" and "Edison's Exhibit, First Transmitter"?

A. Myself and Mr. Ott, I believe.

Q. 10. I call your attention to another piece of apparatus and ask you if you know what it is?

A. It is what is known as the electro-motograph, applied to a telephone, whereby the telephone is actuated by impulses of electricity acting upon a porous cylinder in a manner now, as yet, unknown.

Q. 11. When did you invent the electro-motograph?

A. 1873.

Q. 12. What was the object of this apparatus?

A. The only practical application ever made of this discovery was its connection with the receiving telephone for the purpose of amplifying sound. It was called the loud speaking telephone, but never came into practical use on account of the fact that it was too uncertain, its mode of action being not understood.

Q. 13. Is this apparatus also known as the chalk receiver?

A. Yes, it has been called that.

Q. 14. Was the moto-graph or chalk receiver patented by you?

A. Yes, sir, some time prior to 1880.

Q. 15. What were the difficulties encountered in connection with the chalk receiver or moto-graph to which you have referred?

A. Uncertainty. Up to the present time I have been unable to produce a dozen cylinders which would give the same results, probably due to the fact that the cause of the movement produced by the electric wave is unknown.

The apparatus last referred to by the witness is "Edison's Exhibit, First Chalk Receiver."

Q. 16. I call your attention to another piece of apparatus and ask if you can identify it?

A. It is a chalk receiver for a telephone, one I used in 1902 for testing a great many different kinds of chalk and other finely divided material, compressed in cyl-

inders, to see if I could not get something having some degree of constancy.

Q. 17. Do you recall when this apparatus was made?

A. Some time in 1902; it might have been a little earlier, but I think around about that time.

(The apparatus last referred to by the witness is "Edison's Exhibit, Second Chalk Receiver.")

Q. 18. I show you a note ("Edison's Exhibit, Note No. 1"), and ask you if you can identify the same?

A. This note was written by me.

Q. 19. What does it relate to?

A. It relates to this experiment of the recording telephone.

Q. 20. What was the purpose of the experiments referred to in the note?

A. Those were the pressure foots or electrodes through which the current passed into the chalk cylinder.

Q. 21. Why did you suggest the use of several different kinds of electrodes?

A. I wanted to see whether the nature of the metal or substance in contact with the chalk had any influence upon the result.

Q. 22. I show you another sketch ("Edison Exhibit Note No. 2"), and ask you if you can identify the same?

A. Yes, this is my handwriting.

Q. 23. What was the purpose of the experiments recorded on this note?

A. To study this phenomena with a view to finding out the cause of the phenomena.

Q. 24. Do you recall what was done with these two notes or to whom they were handed?

A. To John Ott, the experimental superintendent, and I believe most of them were made.

Q. 25. I show you another sketch ("Edison's Ex-

hibit, Sketch of Chalk Receiver") and ask you if you can identify it?

A. Yes, this is one of the sketches, showing one or two varieties of hand revolving chalk telephones for use in these experiments.

Q. 26. What relation, if any, was there between this sketch and the two model exhibits "Edison's Exhibit, First Chalk Receiver" and "Edison's Exhibit, Second Chalk Receiver"?

A. I think these were rough indications of what I wanted, as shown in the two model exhibits.

Q. 27. I show you a sketch ("Edison's Exhibit, Recording Telephone Sketch No. 1") and ask you if you can identify it?

A. Yes; this is a sketch by myself.

Q. 28. What does it represent?

A. It is probably some sketch made in explaining to John Ott how to construct the final device which I was going to put on the recording telephone.

Q. 29. I show you another sketch ("Edison's Exhibit, Recording Telephone Sketch No. 2") and ask if you can identify it?

A. That was another sketch explanatory of how to construct the final instrument.

Q. 30. With regard to this sketch No. 2, are you able to describe the apparatus which you expected to make by reference to the real letters appearing on the sketch?

A. *h* is the chalk cylinder; *m* the recording point; *i* the body holding the diaphragm; *g* is the shaft which gives rotation to the chalk; *f* is the worm gear; *d* the worm arm, and *c* a wheel which runs on the cylinder connected with the phonograph mandrel; the rotation of the cylinder *h* gives motion sufficient to turn the chalk cylinder very slowly and at the same time the wax cylinder upon the larger part of the drum is rotating; *j* is what we call the pen or the electrode leading the current into the chalk.

Q. 31. I show you another sketch ("Edison's Ex-

hibit, Recording Telephone, Sketch No. 3"), and ask you if you can identify it?

A. This is a part of the apparatus, *i* being the chalk, *i* the pen or electrode which is connected to the two diaphragms *g* and *h*; *f* is the recording mechanism.

Q. 32. Did you make this last sketch?

A. Yes, sir.

Q. 33. Did you ever build an apparatus in accordance with recording telephone sketches, Nos. 1, 2 and 3?

A. Yes.

Q. 34. What was done with these three sketches?

A. I gave them to John Ott.

Q. 35. What did he do?

A. He constructed the machine.

Q. 36. I call your attention to a piece of apparatus before you and ask you if you can identify it?

A. Yes, sir; that is the complete machine, the recording telephone.

(Witness refers to "Edison's Exhibit Recording Telephone.")

Q. 37. That machine then was constructed after the three sketches?

A. Yes, sir.

Q. 38. Do you remember when this machine was built?

A. 1902.

Q. 39. What, if anything, was done with the machine after it was finished?

A. Just tested to see whether the mechanism was all right.

Q. 40. What kind of a test did you make of it?

A. Just ran it back and forward.

Q. 41. Did you find that it operated satisfactorily?

A. Yes; it operated all right.

Q. 42. What then was done with it?

A. It was set aside.

Q. 43. For what purpose was it set aside?

A. So that I could continue the experiments with the chalk to produce a commercial application of the motograph principle to the apparatus.

Q. 44. Your application for a patent on this apparatus was not filed until September 16, 1906; why did you wait so long before applying for a patent after completing the machine?

A. Because I thought I had applied for a patent. I remember writing out the specifications, and I believe I sent them to New York, but somehow, by change of patent lawyers and such, I found it was never filed.

Q. 45. What change, if any, did you make in your patent lawyers?

A. I made change from the firm of Dyer & Dyer to Mr. Frank L. Dyer, who came to the laboratory and opened an office in April, 1905.

Q. 46. When I called your attention to the fact that an application had not been filed on this machine what was done?

A. I insisted that it was, and I believe a search was made over in New York to find out.

Q. 47. Was the application then filed?

A. It was then immediately filed, when no record could be found of the previous filing.

Q. 48. With reference to the exhibit "Recording Telephones," after it was constructed and operated as you have said, why was not the invention pushed commercially?

A. Because one of the necessary parts of the telephone, to wit, the chalk, could not be got to give even results sufficient to make it a commercial success on a railroad telephone line and it was necessary to go into a great deal of experimenting to produce a reliable chalk and such experiments have been continued for many years and are still being made now. If the cause of this phenomena could be ascertained there would probably be no trouble in producing a reliable chalk

cylinder, but so far I have been unable to find out the cause or to produce an even result.

Q. 49. That is to say, as I understand it, some of the chalk cylinders work satisfactorily and others do not?

A. Yes, although made exactly the same as far as we know.

Q. 50. When was this machine operated; as soon as it was built or later?

A. As soon as it was built.

CROSS-EXAMINATION BY MR. MASSIE:

x-Q. 51. How do you identify these two exhibits, "Edison's Exhibit, First Transmitter" and "Edison's Exhibit, First Receiver"?

A. By seeing them around the laboratory and knowing of their construction.

x-Q. 52. The same answer will apply to the other physical exhibits; you identify them in the same way?

A. I identify them by knowing of their construction and operation, and long experimentation.

x-Q. 53. Mr. Frank L. Dyer, your present attorney was a member of the firm of Dyer & Dyer, your former attorneys?

A. Yes, sir.

(Signature and certificate waived.)

Frederick P. Ott.

FREDERICK P. OTT, a witness produced on behalf of THOMAS A. EDISON, being first duly sworn and asked questions by Mr. Dyer, testified as follows:

Q. 1. State your name, age, residence and occupation?

A. My name is Frederick P. Ott, I am forty-six

years old, and reside at 54 Valley Road, West Orange, N. J. My occupation is experimenting.

Q. 2. You are employed by Mr. Edison, are you not?

A. Yes, sir.

Q. 3. How long have you been connected with Mr. Edison?

A. About twenty-three years.

Q. 4. What are your duties, generally speaking?

A. To assist him in any work he may take up or in any of his experiments.

Q. 5. Did you assist Mr. Edison in connection with experiments on recording telephones?

A. I did.

Q. 6. I call your attention to a piece of apparatus ("Edison's Exhibit First Receiver") and ask you if you ever saw it before?

A. Yes.

Q. 7. What was the purpose of this apparatus?

A. For telegraph work to take the place of the telegraph for messages; signals.

Q. 8. What was this particular piece of apparatus for?

A. That was for doing the recording; that one; the recording of telephone messages.

Q. 9. On what are the records made?

A. On a wax record like an ordinary phonograph.

Q. 10. I call your attention to a second piece of apparatus ("Edison's Exhibit, First Transmitter") and ask you if you ever saw it before?

A. Yes.

Q. 11. What is that apparatus?

A. That is the transmitter that sends the message.

Q. 12. What was the purpose of his transmitter?

A. We put a phonograph record on the mandrel and the record operated the telephone transmitter so as to send a message over the line.

Q. 13. Did you ever operate these two pieces of apparatus together?

A. I never operated them together, but I operated the transmitter.

Q. 14. How did you operate this transmitter alone?

A. In connection with the chalk receiver.

Q. 15. Do you remember when these two pieces of apparatus were built?

A. I cannot recall the exact date, but it was a long time ago.

Q. 16. Do you recall ever seeing Ludwig Ott ever experimenting with this apparatus?

A. Yes, he helped us out on it.

Q. 17. Was Ludwig Ott any relation of yours?

A. Yes, he is my nephew.

Q. 18. I call your attention to another piece of apparatus ("Edison's Exhibit, First Chalk Receiver") and ask you if you ever saw that before?

A. Yes.

Q. 19. What is it?

A. The same as the other one, only we put two rollers on it. We never operated that, because we were working at that time on the chalk rollers to get better results; they were stuck on the chalk; they did not stand up as they should.

Q. 20. When you speak of "the other one" which apparatus do you mean?

A. That one (referring to "Edison's Exhibit, Second Chalk Receiver").

Q. 21. Did you operate the second chalk receiver?

A. Yes, sir.

Q. 22. This is a piece of apparatus, as I understand it, that you operated in connection with "Edison's Exhibit, First Transmitter"?

A. Yes, sir.

Q. 23. What is this apparatus known as?

A. The loud-speaking telephone.

Q. 24. Were you familiar with the loud-speaking telephone before these experiments?

A. Yes, sir.

Q. 25. Was it one of Mr. Edison's well-known inventions?

A. Yes, sir.

Q. 26. Do you recall whether it is sometimes referred to as the motograph?

A. Yes, sir; it is sometimes referred to as the motograph and also as the chalk receiver.

Q. 27. Do you remember when these two chalk receivers were made? I have reference to "Edison's Exhibit, First Chalk Receiver" and "Edison's Exhibit, Second Chalk Receiver."

A. Somewhere around 1902.

Q. 28. Were they constructed before or after "Edison's Exhibit, First Receiver" and "Edison's Exhibit, First Transmitter"?

A. That was made first (pointing to "Edison's Exhibit, Second Chalk Receiver").

Q. 29. This chalk receiver was made before the exhibits "First Transmitter" and "First Receiver"?

A. Yes, sir.

Q. 30. What is the purpose of a chalk receiver or motograph; to modify or amplify the sounds?

A. To amplify the sounds.

Q. 31. To what extent would the sounds be amplified?

A. Oh, a great deal louder than the ordinary telephone.

Q. 32. I show you a note (Edison's Exhibit, Sketch of Chalk Receivers), and ask you if you ever saw it before?

A. Yes, sir, I did.

Q. 33. Do you recognize the handwriting?

A. I do.

Q. 34. Whose handwriting is it?

A. Mr. Edison's.

Q. 35. Do you know when this sketch was made?

A. It was made in 1902.

Q. 36. Do you know the purpose of this sketch; why was this sketch made?

A. In connection with the telegraph message; and also to instruct John Ott in reference to the construction of it.

Last answer objected to as incompetent.

Q. 37. I show you another note ("Edison's Exhibit Note No. 1") and ask you if you ever saw it before?

A. Yes.

Q. 38. In whose handwriting is that?

A. Mr. Edison's.

Q. 39. Do you know what it relates to?

A. It relates to the same thing; he used these different metals for pens for the motograph.

Q. 40. I show you another note ("Edison's Exhibit Note No. 2") and ask you if you ever saw that note before?

A. Yes, sir, I did.

Q. 41. Whose handwriting is that?

A. That is Mr. Edison's.

Q. 42. What does this note relate to?

A. It relates to different compounds for chalk rollers.

Q. 43. Did you make experiments in the chalk rollers?

A. Yes, sir.

Q. 44. How many experiments did you make?

A. Oh, we must have made four or five hundred of them with different compounds.

Q. 45. What was the purpose of these experiments?

A. To get a chalk which would be more suitable than the present one.

Q. 46. Are you still working on experiments in chalk?

A. Yes, sir, off and on.

Q. 47. Have you yet succeeded in finding a perfectly uniform material?

A. Not yet, no.

Q. 48. Do I understand from you that in the case of

chalk for the chalk telephone, all chalks are ineffective or only some chalks?

A. Most of them are ineffective.

Q. 49. What about the others.

A. Some of them are fair, but they do not seem to be constant; they do not stand up.

Q. 50. That is, with the same material you get different results.

A. Yes.

Q. 51. I show you a sketch ("Edison's Exhibit, Recording Telephone Sketch No. 1") and ask you if you ever saw that before?

A. Yes.

Q. 52. Who made this sketch?

A. Mr. Edison.

Q. 53. Do you know when it was that you first saw it?

A. When I first saw it was down in John Ott's room in 1902.

Q. 54. Do you know why John Ott had this sketch?

A. To build the machine from.

Q. 55. Can you describe the machine which the sketch is designed to represent from the letters of reference on it?

A. Yes.

Q. 56. Will you do so?

A. That is the machine over there (indicating).

Q. 57. But can you refer to the letters and say what they represent?

A. *a* is the cylinder and *b* is the drum to rotate the chalk roller; *c* is the roller.

Q. 58. The chalk roller?

A. No, the rubber roller, rotated by the drum; and *d* is the worm shaft which is operated by the small friction wheel, and *e* is the small wheel that is turned by the worm; *f* is the shaft turned by the worm wheel, *g* is the chalk roller and *h* is the pen or electrode; *i* is the diaphragm connected to the pen.

Q. 59. I show you a sketch ("Edison's Exhibit, Re-

coding Telephone Sketch No. 2") and ask you if you ever saw that before?

A. Yes, sir.

Q. 60. Do you know who made the sketch?

A. Mr. Edison.

Q. 61. When did you first see this?

A. In 1902, in John Ott's room.

Q. 62. What was the purpose of this sketch?

A. The same as the other.

Q. 63. Can you describe the machine that this sketch is designed to illustrate?

A. *a* is the drum or mandrel carrying the blank cylinder; *b* is the drum rotating with the mandrel driving the rubber wheel *c* which drives the shaft *d* and then it drives the worm *e* and the worm wheel *f*, which rotates the shaft *g* carrying the chalk roller *h*; *i* is the diaphragm connected by the electrode *j* which bears on the chalk roller; *k* is the arm supporting the shaft *g*, and *m* is the recorder which makes the record in the wax.

Q. 64. I show you a third sketch ("Edison's Exhibit, Recording Telephone Sketch No. 3") and ask you if you ever saw that before?

A. Yes, sir.

Q. 65. When did you see it and where?

A. In John Ott's room in 1902.

Q. 66. Who made this sketch?

A. Mr. Edison.

Q. 67. Can you describe the device illustrated by this sketch?

A. *a* is the frame of the recorder, *b* is the lower diaphragm, *c* is the floating weight, *d* is the small lever connected to the lower diaphragm by the link *e* and carrying the recorder stylus *f* at the other end; *g* is the upper diaphragm which vibrates the lower diaphragm by the air cushion between them. The upper diaphragm is connected with the electrode or pen *h* which carries the little button *i* bearing on the chalk roller *j*.

Q. 68. Do you remember whether a machine was built to exemplify the device illustrated by these three sketches to which you have just testified?

A. Yes.

Q. 69. Will you please point out the machine, if you find it present?

A. There it is over there. (Witness refers to "Edison's Exhibit, Recording Telephone.")

Q. 70. Did you witness the construction of this machine?

A. Yes, sir; I did.

Q. 71. Where was this machine built?

A. In the Laboratory on the second floor.

Q. 72. What were you doing at the time?

A. Working on the chalk rollers.

Q. 73. How often did you have occasion to witness the construction of this machine?

A. Oh, I would go in there once a day to see its progress.

Q. 74. How long was the machine under construction?

A. Oh, we worked on it for a month, I guess.

Q. 75. Is the machine now throughout or simply an old phonograph remodeled?

A. It is an old phonograph remodeled.

Q. 76. Do you recall who worked on the machine?

A. No, nothing more than it was being built under the supervision of Mr. John Ott.

Q. 77. Do you recall whether this machine was built during the time or after the experiments were made in transmitting messages from the apparatus "Edison's Exhibit, First Transmitter" to the receiver, "Edison's Exhibit, First Receiver"?

A. After this chalk receiver was built work was commenced on the recording telephone.

Q. 78. After Edison's Exhibit Recording Telephone was constructed, what was done with it?

A. Turned over to me and we took it down to the

Galvanometer Room and ran it and tested it, and as far as the machine went it was all right.

Q. 79. How did you operate this machine, by hand or by the electric motor in it?

A. By the electric motor in it.

Q. 80. How long did you operate it?

A. We ran it for about fifteen or twenty minutes to see everything ran all right.

Q. 81. How did it work?

A. Everything worked all right.

Q. 82. Did you operate it long enough to cause the carriage to travel one or more times across the mandrel?

A. Oh, yes, sir.

Q. 83. Did you find during this operation that the chalk wheel was turned properly?

A. Yes, sir.

Q. 84. The record books of the laboratory (Edison's Exhibit Book Extracts) show that you were employed in connection with experiment number 1283 entitled "Recording Telephone" from June 4, 1902, until June 30, 1902. Are you able to state whether the machine "Edison's Exhibit, Recording Telephone" was constructed during that period?

A. It was.

Q. 85. That is to say during the time you were working on the chalk-rollers this machine (Edison's Exhibit, Recording Telephone) was built and finished?

A. Yes, sir.

Q. 86. Was it operated during this time or afterwards?

A. It was operated during the time we were working on the chalk rollers?

Q. 87. Since the construction of this machine have you been able to give your time continuously to experiments on the chalk rollers?

A. Not continuously, no.

Q. 88. What have you been working on principally?

A. The storage battery, lately.
Q. 89. How many experiments have you and Mr. Edison made on storage batteries during the past four years?

A. It would be close to 5,000 or something in that neighborhood; our record books would show it.

CROSS-EXAMINATION BY MR. MANSIE:

x-Q. 90. How do you know that the sketch of recording telephone "No. 1" was made by Mr. Edison?

A. Because I know his sketches and am familiar with his handwriting; I could tell his sketches out of a thousand.

x-Q. 91. I would ask the same question about Edison's Exhibit, Recording Telephone, sketches No. 2 and No. 3; how do you know they were made by Mr. Edison?

A. I have handled so many of them and am so familiar with them that I know his sketches the moment I see them and I could tell whether it was made by him or not.

x-Q. 92. Do you notice any handwriting of Mr. Edison's on either of these two sketches?

A. No, not on them.

x-Q. 93. How do you know that these sketches were made in 1902?

A. Because we were working on that at the time and I was in my brother's room working on the chalk rollers and getting information in there when these sketches were handed to him.

x-Q. 94. How do you fix the date as being 1902?

A. Because I was working on that (indicating "Edison's Exhibit, Second Chalk Receiver") at the same time.

x-Q. 95. How do you know it was in 1902 that you were working on "Edison's Exhibit, Second Chalk Receiver"?

A. Because we had them connected together, work-

ing them; as fast as we could make the chalks we would put them in and test them.

x-Q. 96. The question is: "How do you know it was in 1902 that you were working on that thing?"

A. By making the rollers, chalk rollers, for it; I was pressing the chalk put in the mold, molding the chalk.

x-Q. 97. How do you know that it was in the year 1902 that you were molding the chalk; as I understand your testimony you fix the date of the sketches because at that time you were working on the apparatus and you fix the date of the apparatus because at that time you were molding the chalk; but how do you know that all of this was in 1902?

A. By the time I worked on it.

x-Q. 98. When you operated or tested "Edison's Exhibit, Recording Telephone," was there a sound record on the mandrel?

A. No.

x-Q. 99. Have you ever worked upon or do you know anything of any other recording telephone that Mr. Edison has produced except this particular exhibit?

A. No, I cannot say that I do.

RE-DIRECT EXAMINATION:

Re-d. Q. 100. Did you ever see Mr. Edison make pencil sketches?

A. Yes, sir.

Re-d. Q. 101. Do you entertain any doubt at all that the three sketches, Edison's Exhibit, Recording Telephone Sketches 1, 2 and 3, respectively, were made by him?

A. They were made by him and I will vouch for it. We used to work twenty-one hours out of twenty-four making sketches and making things and I ought to be pretty familiar with them, I think.

Signature and certificate waived.

Counsel for Edison in order to show the public knowledge of the construction and operation of the motograph or chalk receiver offers in evidence a copy of Edison's patent number 221,957 dated November 25, 1879, and the same is marked "Edison's Exhibit, Chalk Receiver Patent."

Counsel for Macdonald objects to the exhibits as incompetent for the purposes stated, and as irrelevant and immaterial.

William A. Warren.

WILLIAM A. WARREN, a witness produced on behalf of Thomas A. Edison, having been first duly sworn, in answer to questions propounded by Mr. Dyer, testified as follows:

Q. 1. Please give your name, age, residence and occupation.

A. My age is twenty-six; I reside at 2 University Place, Orange, N. J.; and my occupation is that of a manufacturer of electrical measuring instruments.

Q. 2. Are you familiar with mechanical and electrical subjects?

A. Yes.

Q. 3. State briefly what your education was in these subjects?

A. I spent four years in Columbia University from the fall of 1898 to the spring of 1902 in the electrical engineering course and during that time experimented, outside of the course, on various schemes of my own, both mechanical and electrical. In the spring of 1902, I was employed by Mr. Edison as an experimenter and on electric furnace work and later on on automobile work and then went to the Edison Portland Cement Company as electrical engineer and was there for two

months, and until about September 1st, when I returned to the laboratory.

Q. 4. What were your duties at the works of the Edison Portland Cement Company?

A. Electrical engineer, devising new schemes for the application of electricity at the works.

Q. 5. You say you came back to the laboratory about the 1st of September, 1902. How long did you remain there?

A. Until sometime the next spring.

Q. 6. What did you then do?

A. I went back to the Edison Portland Cement works as consulting engineer.

Q. 7. When you came back to the laboratory about the first of September, 1902, did you have occasion to make any experiments on recording telephones?

A. Yes, I worked at trying to produce a more sensitive transmitter than was on the market at that time, trying to make an improved transmitter.

Q. 8. How long did you continue on that work?

A. On that and other work that I carried on at the same time, for about two months.

Q. 9. I call your attention to a piece of apparatus ("Edison's Exhibit, Recording Telephone") and ask if you ever saw this machine?

A. I did, yes; Mr. Edison had that machine built during either September or October, 1902, at least then is when I first saw it.

Q. 10. Was that machine completed at that time?

A. Yes, sir.

Q. 11. In the same form as it is now?

A. Yes, sir.

Q. 12. Did you ever see the machine operated?

A. No.

Q. 13. Did you ever examine this machine from the standpoint of an electrical engineer?

A. Yes, sir.

Q. 14. Is this machine in your opinion an operative machine?

A. Yes, sir.

Q. 15. Are you familiar with the construction and operation of the chalk receiver?

A. Yes, sir.

Q. 16. Have you ever operated the chalk receiver?

A. Yes.

Q. 17. If the machine before us is of such mechanical construction that on the turning of the mandrel the chalk receiver will slowly rotate, do you entertain any doubt if vibrations corresponding to sound waves are received at the electrode of the chalk receiver, the vibrations set up and communicated thus to the recording stylus would be recorded on the phonograph blank?

Question objected to as without sufficient foundation.

A. No, there could be no doubt about it.

CROSS-EXAMINATION BY MR. MANSIE :

“Q. 18. Is it your understanding that the exhibit concerning which you have testified, “Edison’s Exhibit, Recording Telephone,” is at present in such condition that if connected with telephone wires in circuit and having a blank cylinder on the mandrel, you could thereby record a record on that cylinder?

A. (Witness examines the machine carefully). Yes.

Signature and certificate waived.

Adjourned until a day to be agreed upon.

ORANGE, N. J., October 1, 1906.

Mat pursuant to agreement.

Present—Counsel as before.

Frank L. Dyer.

FRANK L. DYER, having already been duly sworn as a witness on behalf of Mr. Edison, testifies as follows:

I have already testified as a witness in this case, but I wish at this time to corroborate a statement made by Mr. Edison in his deposition. Shortly before the Edison application was filed, and certainly not earlier than September 1, 1905, I observed in the Galvanometer Room of the Edison Laboratory, the piece of apparatus which has been introduced herein as “Edison’s Exhibit, Recording Telephone.” In the Galvanometer Room were a large number of experimental and commercial apparatus, representing part of Mr. Edison’s work as an inventor. The exhibit in question was then in the same condition as it is now, and so far as I could see, it appeared to be completely finished and a perfect piece of apparatus. I called Mr. Edison’s attention to the exhibit and asked him what it was, and he informed me that it was a recording telephone for the purpose of recording telephone messages on a phonograph and that the invention was to be used in connection with railroad signaling. I asked him why he had not filed an application for a patent on the device and replied that he had. I informed him that no application has been filed to my knowledge, nor had I ever heard of the apparatus before, but he insisted that he was right, and that the records in my office in New York would disclose the fact. I thereupon had a search made through the records of my New York firm, Messrs. Dyer & Dyer, 31 Nassau street, but nothing was found to substantiate Mr. Edison’s belief. Mr. Edison explains his failure to file the application to the possible fact that in changing

his attorney, the matter may have been overlooked. I came to the Laboratory to take charge of Mr. Edison's work on April 1, 1903. For some months prior to that time Mr. Edison had repeatedly urged me to take charge of his work personally, as he was dissatisfied with having the work done in New York, and I finally consented to do so.

The deposition of the witness is objected to as irrelevant and immaterial.

No cross-examination.

Signature and certificate waived.

STATE OF NEW JERSEY, } ss.:
County of Essex,

I, HERBERT W. KNIGHT, a Master and Examiner in Chancery in and for the State of New Jersey, and Special Examiner by consent herein, do hereby certify that the foregoing depositions of Ludwig F. Ott, John F. Ott, Frank L. Dyer (3), Thomas A. Edison, Fred'k F. Ott and William A. Warren, were taken on behalf of Thomas A. Edison in pursuance of the notice hereto annexed before me at the Edison Laboratory, West Orange, New Jersey, on the 24th day of July, 1906; on the 25th day of September, 1906, and on the 1st day of October, 1906; that each of said witnesses was by me duly sworn before the commencement of his testimony; that the testimony of each of said witnesses was taken stenographically by me by consent of counsel for both parties and was then transcribed by me on the typewriter, and that the opposing party was represented by G. A. L. Massie, Esq.; that said testimony was taken at West Orange, New Jersey, and was commenced at 10:30 A. M. on the 24th day of July, 1906; was continued on the 25th day of September, 1906, and was concluded on the 1st day of October, 1906; that I am not connected by blood or marriage with either of said parties, nor interested directly or indirectly in the matter in controversy.

In TESTIMONY WHEREOF I have hereunto set my hand at Newark, New Jersey, this eighth day of October, 1906.

HERBERT W. KNIGHT,
Master and Examiner in Chancery.

Invoice United States Express Co.
June 10 Express on soap from Gaunt & Jauvier..... .35 .25

Pay Roll week ending June 4, 1902

F. P. Ott one week 35.00
John F. Ott 4 days 18.07
Arthur Estler 20 hours at .30 6.00
..... 37.07

Pay Roll week ending June 11-1902

F. P. Ott one week 35.00
J. F. Ott 1 day 4.17
Bogues Puchoburger 3 hours 25¢. .45
Arthur Estler 45 " 32½¢. 14.63
..... 54.25

Pay Roll week ending June 18-1902

F. P. Ott one week 35.00
J. J. Richter 4 hours at .30 1.20
A. S. Barnes 1 " " 30. .30
Arthur Estler 56 " " 30. 17.88
..... 54.38

Pay Roll week ending June 25-1902

F. P. Ott one week 35.00
J. J. Richter 61 hours at .30 18.30
Arthur Estler 62 " " 32½¢. 17.88 71.18
..... 207.48

July 1902

Invoice Edison Phonograph Works
Silver Plate 37 small pieces. Labor and Material..... .35
1 lb. .025 Sheet Brass 10..... .10
..... .35

Pay Roll week ending July 5, 1902

J. J. Richter 10 hours..... 11.70
Arthur Estler 44 " " 32½¢. 14.30
..... 26.00

Pay Roll week ending July 9-1902

F. P. Ott 5 days 5.83½ 11.67

Pay Roll week ending July 25, 1902

Louis Ott 5 hours 15..... .75
Pay Roll week ending July 30-1902
Louis F. Ott 27 hours 15 (Time sheet dated June 25-1902)..... 4.05 42.47

October 1902

Pay Roll week ending Oct. 5, 1902

W. A. Warren 1 week..... 12.00 12.00

December 1902

Louis F. Ott week ending Dec. 17, 69-10 hrs..... 15 1.50
General Expenses..... 146.78
..... \$462.17

Edison's Exhibit Extracts Experiment No. 1148.

RAILWAY TELEPHONE EXPERIMENT FOR BLOCK SIGNALS.

S. O. No. 1148.

July 1901

J. F. Ott, July 29, 1901-1 Day..... \$4.16
Louis F. Ott
July 27-8 hours July 29-5 hours..... 1.50
Total hrs. 10 5.66

August 1901

Invoice Edison Mfg. Co.
" 28 8 2 Cells Complete \$16.00 Less 40% 9.60
Invoice Edison Phonograph Works
Aug. 18 19 12 No. 15 Cord .04½ Yd..... .18
" 29 2 Std. Phonos. less reproducers 4.00 Del'd 9.50
" 2 Recorder Blue Cabinets 4.10 8/3 8.20 17.58

Invoice Manhattan Electrical Supply Co.

" 16 2 No. 18 Desk Telephones for Magnet 6.00 12.00
" 3 Fuller Standard Told belts Comp. 75..... 1.50
" 5 Ft. No. 8 Cind Cord 12-45% .30
" 2-30 ohms Magneto Extension Bells 1.20 2.50

John

May 1902

J.S.P.

Make following Cylinders for
small Malograph ~~to~~ make
them same size as chalks when
moulded & ~~the~~ bore them out ^{to size} but
do not turn off in surfaceaddy
all will ~~if~~ turn them to size

Bisulphide of Copper ✓
Best Thermo battery make it for you
Metallic Magnesium

" Aluminium ✓
" Iron or steel ✓
" Antimony ✓
" Zinc ✓
" Cadmium ✓
" Bismuth ✓

One of Bone ✓
" " Horn ✓
" " glue —

Walrus hide —
✓ paper, bond paper cut in disks
✓ Mica, I will give you piece to turn it from
✓ Steatite (soap stone)
— Truck kid leather
✓ Sheepskin parchment cut in disks
✓ Raw hide
✓ Boxwood — — — JAE

John Alt-

Make Holograph pens
of Port Henry Magnetic ore & crystal
there is some in top floor library
among the iron ore.

Another pen of Iron Pyrites, +

" Monosulphide of nickel
" Gold -

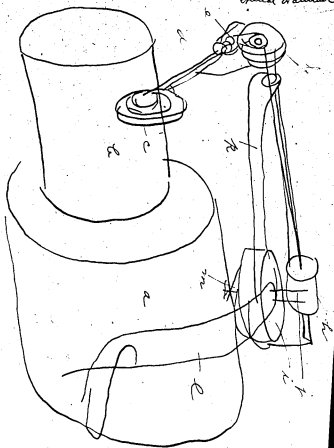
May 1902

J. F. Ctl.

Blavin 2	} Interference	25677
MacDonald		

Edison Exhibit Note No. 1
H. B. Wright
Special Examiner

Remus Gales Patton
Lesson in
Macromes } *In the*
Lesson in Habit Recording } *25 677*
Lesson in Habit Recording } *Lesson in Habit Recording*
Lesson in Habit Recording } *Lesson in Habit Recording*



Recording of Habit

... .. ?

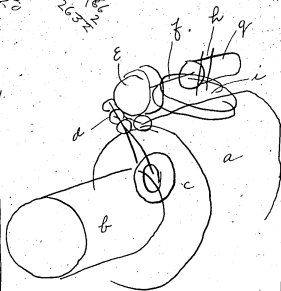
25.677

Telephone Technical Recording Department
 Frank W. Wright
 Special Examiner

Recording Telephone

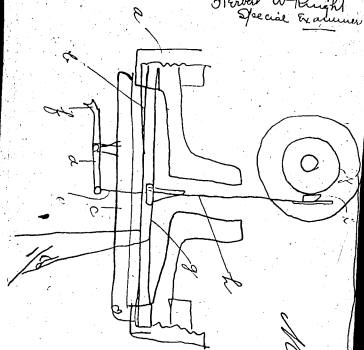
May 29/02

J.F.G.



United States Patent Office
 Edison } Invention
 in }
 connection with } 25677

Edison's Exhibit Recording Telegraph No. 3
 Heral w/ Knight
 Special Examiner



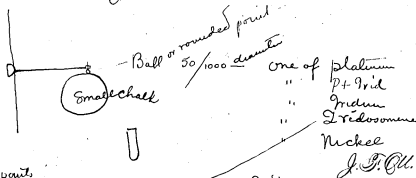
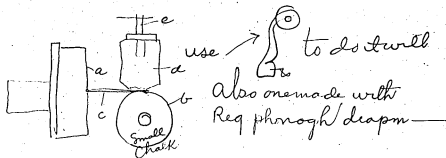
May 1902

J. B. Knight

John - Make these



should get twice the volume of sound
as resistance can be got low + both
increase + diminution of friction will help



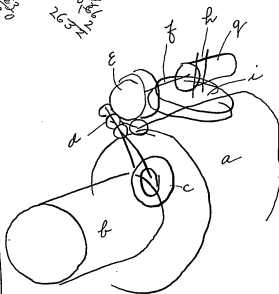
Make these parts
about 1/8 to 1/4 long
+ easily inserted or fastened
in end of arm.

Sumner. Iridium.
May 1902

Trucks Scales Patent Office
 Edison
 in } Inventions
 Monopoles } 25374
 Edison's Exhibit Recording System 201
 Edison's Exhibit
 Special Examiner

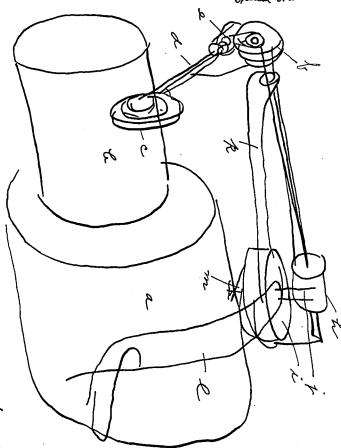
J. E. Galt.

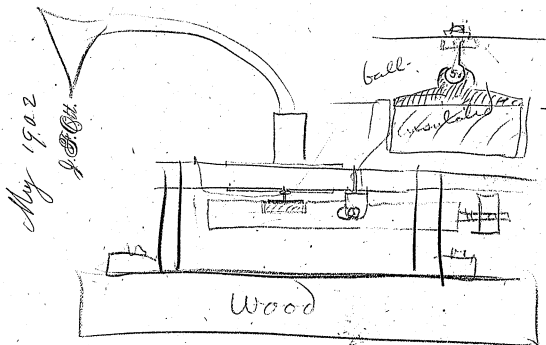
$$\begin{array}{r} 3 \overline{) 3350} \\ \underline{990} \\ 2660 \end{array}$$



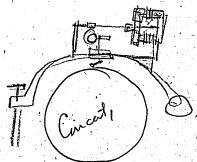
Edison's Exhibit Recording Telephone Sheet No 2
Herbert W Knight
Special Examiner

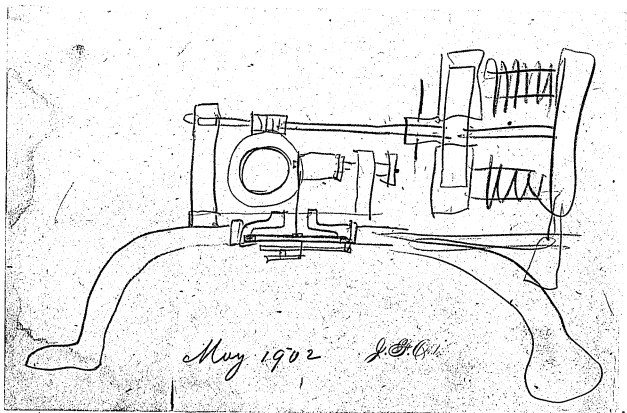
Recording Telephone
May 29/02





May 1902 J.F.G.H.





[ON BACK OF PRECEDING PAGE]

Wind Armature

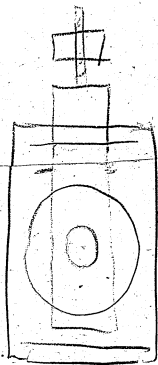
with No 26 $\frac{18}{100}$ i.e. $\frac{28}{1000}$

6 turns in each layer

36 in each dir 846 turns

Resist of Armature $1\frac{1}{4}$ Ohms





May 1902

J.F.O.

Legal Department

Frank L. Myers, Counsel

BOX 51258

Charles A. J. White

Paper Exhibit - not used
Edison & Macdonald

Legal Box
165

United States Patent Office.

EDISON
vs.
MACDONALD.

INTERFERENCE
No. 25,677.

BRIEF FOR EDISON.

FRANK L. DVER,
For Edison.

C. O. BURGESS, Walker and Centre Streets, N. Y.

UNITED STATES PATENT OFFICE.

EDISON
vs.
MACDONALD.

Interference
Number 25,577.
PHONE
APPARATUS.

BRIEF FOR EDISON.

The questions presented in this case are the usual questions that arise in interferences, where priority alone requires to be determined. The law seems to be well settled and it is necessary only to ascertain what significance is to be given to the testimony taken and the exhibits filed on behalf of Macdonald. From Edison's point of view, his own testimony establishes the fact with the reasonable amount of certainty required of any junior party, that the invention defined by the several counts of the issue was reduced to practice by him prior to its reduction to practice by Macdonald. From the same viewpoint it is submitted that the testimony of Macdonald shows that anything that may have been done by him prior to Edison's reduction to practice can only be looked upon as a conception of the invention, and that any efforts to reduce the invention to practice at that time amounted to no more than unsuccessful and abandoned experiments. Should this aspect of the case be accepted by the Office, then the only question open for consideration is whether Edison by reason of his failure to file an application for a patent until about three years

after reduction to practice can now be deprived of his rights as the first inventor. Before discussing these questions, the respective inventions of the two parties should be first understood, because the nature of those inventions is such that certain doctrines are believed to be applicable to one and not to the other. The two inventions are radically different and they have been brought into interference only because the contents of the issue are drawn in extremely broad language.

Edison's Invention.

Edison's specific invention is a recording telephone, the idea being to produce an apparatus in which telephonic messages will be automatically recorded on a phonograph. The apparatus, therefore, comprises an ordinary phonograph and an ordinary chalk receiver or motograph, whose diaphragm is located adjacent to the diaphragm of the phonograph, so that the words received by the telephone will be spoken into the phonograph, and a permanent record thereof will be made. So far as the phonograph is concerned, there, of course, cannot be the slightest doubt that when sound waves are received by its diaphragm, a graphic record thereof will be made on the wax cylinder. So far as concerns the chalk receiver or motograph, there can, with equal certainty, be not the slightest doubt that electric modulations corresponding to sound waves received at the electrode thereof will be converted into sound waves and thereby be rendered audible. As a matter of fact, both the phonograph and motograph, or loud speaking telephone, are well known inventions of Mr. Edison, with which the scientific world and Patent Office have been perfectly familiar for more than twenty years, and there can be no more doubt as to the operations of these two devices than there can be at the present time of the Remington Typewriter, or of a stock ticker. It is believed that the Patent Office can, and should, take judicial

notice of the operations of two such well-known devices, even if their operations has not been proved, as we have taken the pains to do in this case. The operations of a motograph and of a phonograph, individually considered, being conceded, the operations of an apparatus in which a motograph is combined with a phonograph and in which the diaphragm of the motograph is arranged adjacent to the diaphragm of the phonograph, must necessarily follow. In a broad sense, a phonograph combined with a motograph in such a way that the sounds produced by the former will be recorded by the latter is not new, having been successfully demonstrated in this country more than fifteen years ago and being described in scientific publications in the Patent Office library, so that the Examiner can also take judicial notice of this fact. See, for example, *Electrical Review* (New York) of February 16, 1889, page 4, and *The Telegraphic Journal and Electrical Review* (London) of March 8, 1889, page 269. (Vol. 21, January 4 to June 28, 1889.) The invention on which the Edison application is based therefore is not broadly the combination of a phonograph and a chalk telephone, but the specific arrangement wherein the chalk telephone is supported by and moved with the phonograph carriage, so that the diaphragm of the motograph will always occupy the desired close relation with the diaphragm of the phonograph, suitable mechanism being employed to slowly rotate the chalk cylinder of the motograph as the carriage slowly progresses longitudinally of the rotating wax cylinder. The specific mechanism described by Edison comprises a drum 28, mounted on the mandrel shaft and engaged frictionally by a roller 22, which connects with the chalk cylinder 20 by means of gearing 31, 32, 33, 34 and 35. In this way the chalk cylinder of the motograph instead of being turned slowly by hand as in the usual way, is rotated by the same power that operates the phonograph, the mechanism being such that the chalk cylinder will be turned notwithstanding its progressive

movement longitudinally of the phonograph recording cylinder. So far as the Edison invention may therefore represent a departure in the art, it resides solely in the mechanism for rotating the chalk cylinder of the micrograph and the mounting of the latter on the carriage of the phonograph. The invention is essentially mechanical and of the simplest possible character. Its consideration involves nothing new either in the phonographic or telephonic arts, but as stated the phonograph is the ordinary phonograph and operates in the usual way, and the telephone is the ordinary telephone which also operates in the usual way.

Macdonald's Invention.

Contrary to the situation present in Edison's work, Macdonald's invention is directed towards a very modern art, which at the date of the experiments on which he will no doubt rely for a reduction to practice, was comparatively undeveloped. That art is the amplification of sound waves by variations in friction between two contacting surfaces, an illustration being found in Patent No. 678,566 of July 16, 1901, granted to Daniel Higham, and referred to in the Macdonald application in *interferences*. Macdonald sought to embody the Higham invention in a commercial talking machine, in order that the sounds that were recorded or reproduced might be amplified. Referring to this patent and to Figure 1 thereof, as a convenient illustration, the apparatus comprises a rotating friction cylinder C, with which a shoe L engages, the latter being pressed with greater or less friction by means of a lever D connected to a diaphragm A (called the primary vibrating means) and the shoe L being connected to a second diaphragm B (called the secondary vibrating means). If, for instance, sound waves are impressed on the diaphragm A, the lever D will be vibrated so as to vary the friction between the shoe L and cylinder C, and this sets up amplified vibrations in the diaphragm B. In applying such a device to the phonograph, if it

is desired to secure amplified reproduction, a phonograph reproducer is connected to the lever D, so as to vibrate the same, while, if it is desired to apply the principle to a recording machine, the diaphragm B is dispensed with and the shoe L is connected to a suitable phonographic recorder. But, at the date of the application for the Higham Patent, April 25th, 1901, this principle had not been developed beyond the domain of experiment.

In fact, it is stipulated in the case (*A. R.*, pp. 33-35) that on August 17, 1900, Higham filed an earlier application for patent, that "the specification and drawings thereof are substantially the same as the specification and drawings of Higham's U. S. Letters Patent No. 678,566," and that on December 8, 1900, the Examiner in charge of the case requested that "practical demonstration of the *operativeness* of the device be made before the Examiner, if the alleged invention has been actually reduced to practice." This indicates very clearly that even to so skilled a person in the art as the Examiner, the operativeness of an amplifying friction reproducer was not only not clear, but was *actually doubted* by him.

As Macdonald states in his testimony to which reference will hereafter be made, it was not until June or July, 1904, that Higham had perfected his devices. These improvements are illustrated in Higham's Patents No. 783,750, February 29th, 1905, and No. 808,052 December 19, 1905. An examination of these patents will show that as compared with the very crude construction of his patent of July 16, 1901 (No. 678,566), Higham's improvements were radical in character and involved the following changes and modifications, among others:

First, a complete reorganization of the friction pads, Secron, making the friction wheel of amber, so as to develop a high and very uniform friction.

Turns, grooving the friction wheel, and determining the proper angle of the groove to give the desired results, and

FOURTH, weighting the friction wheel and allowing it to rest by gravity in the hight formed by the friction pads, so as to automatically secure uniformity of friction. It may be stated positively that without these four radical changes, the Higham friction amplifying devices would never have passed out of the realm of experiment.

Whatever efforts Macdonald may have made, therefore, in 1901, to perfect the Higham apparatus would necessarily be expected to be crude and the evidence shows that this was so and that whatever was done was in the nature of pure experiment. What Macdonald sought to do, and what he describes in his application, is the making of a *reproducing machine* in which the Higham amplifying devices are applied to a graphophone. To this end the friction cylinder of the Higham Patent is mounted on the carriage of a graphophone, and the friction shoe is connected to the diaphragm at one end and at the other end to the reproducing stylus, which engages the record, the idea being that as the stylus is vibrated, the friction will be increased or diminished, and a vibration of the diaphragm will be set up. The means used by Macdonald for continuously rotating the friction cylinder are entirely different from the means used by Edison for rotating the chalk roller of the motograph. Macdonald simply made use of a spindle-shaft connected to the friction cylinder and driven by a gear, so as to permit it to telescope within the gear, as described in his application. It is not easy to see how, as between two such devices as those of Edison and Macdonald, there could be any interference in fact. One is a recording apparatus and the other essentially a reproducing apparatus. One is largely electrical, and the other entirely mechanical. In one, vibrations result in variations in friction, while in the other, the vibrations are supposed to be due to chemical variations developed on the surface of the chalk cylinder, although no one can say positively that this is the true explanation of the operation of the Edison motograph.

The Office, however, believes that an interference does exist between these two forms of apparatus and the counts of the issue have been so drawn as to apparently apply to the respective structures. Neither party has moved to dissolve.

The Issue.

An analysis of the several counts may be of value in determining just what it is that the parties are here contending for. It is to be observed in the first place that all the counts define the subject matter embodied therein as a "phonetic apparatus," which the Office evidently regards as broad enough to include a recording telephone as well as a talking machine.

COUNT 1. This count includes the following elements:

(1) A photographic recording surface. This is, of course, clearly embodied in the Edison application, but there are grave doubts whether it is disclosed with sufficient definiteness in the Macdonald application. The only apparatus illustrated by Macdonald is a reproducing apparatus, and although the application states that the invention "relates to machines for recording and reproducing sounds", it does not follow that the construction of a recording apparatus would be obvious from the disclosure of the reproducing apparatus. Since with a reproducing apparatus the vibrations of the stylus are amplified at the diaphragm, then, if instead of a reproducing stylus, we made use of a recording stylus, and sounds were impressed on the diaphragm, the vibrations would be obviously lessened so that the results would be poorer than if the stylus were connected directly with the diaphragm. In other words, such a device would be a backward step and would be without utility. In order that the Macdonald device might be used as a recording apparatus, it is necessary that the diaphragm should be connected where the reproducing stylus is now connected and

that the recording stylus should be attached where the diaphragm is now located, so that the vibrations of the diaphragm would be amplified and a louder record made. But the application points out no way by which such a change could be effected, and we therefore argue that so far as this element of the issue is concerned the application cannot be regarded even as a constructive reduction to practice. We will point out in consideration of the evidence that Macdonald has not produced a shred of testimony that a machine complying with this requirement of the issue was either conceived or reduced to practice by him.

(2) Means for rotating said surface. This, of course, includes the spring or electric motor of the talking machine, whether the latter is used for recording or reproducing.

(3) A carrier movable across said surface. This includes the usual carriage of the talking machine, by which the recording or reproducing devices are sustained.

(4) A phonograph stylus. Since the issue is specifically limited to a "recording surface," the stylus used must necessarily be a recording stylus and not a reproducing stylus. Macdonald's application in interference does not describe or even refer to a recording stylus, and there is not a word of testimony by Macdonald that he ever experimented with a recording stylus, or made use of the same.

(5) A friction wheel carried by the carrier. This element is the chalk cylinder of the motograph in the Edison application, and the friction cylinder of the Higham amplifying device of the Macdonald application.

(6) A friction member connected to said stylus and pressing against the friction wheel. This is the so-called "pen" or electrode of the motograph in the Edison case, while in Macdonald's application, it is the sectional friction shoe which partially surrounds the friction wheel.

(7) Means representative of sound vibrations for

varying the friction between said friction member and friction wheel. Since the issue, as stated, is specifically limited to recording mechanism the particular means contemplated by this element are difficult to locate. Probably in a recording phonograph, as might, by the exercise of independent invention, be evolved from the special reproducing machine of the Macdonald application, the means would be the recording diaphragm which would be connected to the friction shoe so as to vary the friction between the same and the friction wheel, and which would be responsive to the sound vibrations. With such a device, the only means which would be "representative of sound vibrations" would be the sound waves themselves which, of course, would be too indefinite an element to be included in a specific claim on an apparatus. With a recording telephone like that of the Edison application, the corresponding means would be the electrical devices for varying the friction between the electrode and the chalk cylinder and which are, of course, found in all motographs.

COUNT 2. This count includes the following elements:

(1) A traveling carriage already considered above.

(2) A friction wheel and phonograph stylus carried thereby, also considered above.

(3) A friction member pressing on said wheel and connected to said stylus, also considered above.

(4) Means for driving said friction wheel. This is the phonograph motor which in both cases also rotates the mandrel. The language is, of course, broad enough to include an independent motor for driving the friction wheel.

(5) Means representative of sound vibrations for varying the amount of friction between the friction member and friction wheel. Since this count is not specifically limited to a recording device, this particular element is found in the structure of the Macdonald application, in the talking machine record, which communicates its vibrations to the friction pad,

while with the Edison structure, it is comprehended by the electrical devices of the motograph. It will be seen that the second claim is broader than the first in the single respect that it is not limited to a recording device. It is true that the first count is limited to a motor for rotating the record or surface, but this element must necessarily be used, and that the second count is limited to means for driving the friction wheel which must also be necessarily used.

COUNT 3. This count includes the following elements:

(1) A rotating member. This is the support for the record or recording surface of both applications.

(2) A carriage movable longitudinally thereof, considered above.

(3) A phonograph stylus and friction wheel carried by the carriage, considered above.

(4) A friction member pressing on said friction wheel and connected to said stylus, and considered above.

(5) Common driving means for moving the carriage and rotating the friction wheel. This is the driving motor which performs the double function of feeding the carriage across the record or recording surface and of rotating the friction wheel. This latter feature distinguishes the third count from those previously considered, but in other respects the third count may be considered to be identical with the second.

COUNT 4. This count includes the following elements:

(1) A rotating member, considered above.

(2) A carriage movable longitudinally thereof, considered above.

(3) A phonograph stylus and a friction wheel carried by the carriage, considered above.

(4) A friction member pressing on said friction wheel and pressing on said stylus, considered above.

(5) Common driving means for moving the carriage and rotating the friction wheel, considered above.

(6) Means representative of sound vibrations for

varying the friction between the friction member and friction wheel, considered above.

Edison's Case.

In his preliminary statement, the following dates are alleged:

Conception in April, 1902;

Successful experiments for the purpose of demonstrating the operativeness and utility of the invention in April, 1902;

Sketches illustrating the invention in April, 1902;

Explanation to others in April, 1902;

Working drawings in May, 1902;

Construction of full sized apparatus started May 31st, 1902;

Completion of said apparatus in June, 1902;

Application filed September 16th, 1905.

These dates are all fully sustained by the testimony.

Edison states that "the endeavor to produce a recording telephones arose from the desire on the part of some of the railroad telegraph superintendents to have a system whereby they could change over from the telegraph to the telephone, but they did not want to change unless they had some means of recording all the conversation on the wire, and it was from talking with those superintendents at one of their conventions that I undertook to try and solve this problem" (E. R. p. 27, Q. 7). He says, however, that he has in mind the combination of a telephone with a phonograph so as to make a permanent record of a telephonic record "ever since the invention of the phonograph" (Q. 8). Some time in 1901, experiments were therefore made to test the feasibility of recording telephonic messages on the phonograph, and to this end complete apparatus was constructed (Edison's Exhibit, First Transmitter and Edison's Exhibit, First Receiver). The construction of the first apparatus was in charge of John F. Ott (E. R. p. 11, Qs. 6-9) who remembers the trans-

mission of messages from one to the other. With this first apparatus a phonograph record was placed on the mandrel of the transmitting device, the sounds therefrom were delivered into a transmitting telephone, and were then received by a receiving telephone and delivered to a recording phonograph. The date when the first apparatus was constructed is substantially fixed by the stipulated testimony of John F. Randolph (E. R., p. 23) from which it appears that the charges against the experiment were made between July, 1901, and September, 1901. The itemized statement for this experiment appears in the record as "Edison's Exhibit Extracts Experiment No. 1148" from which it appears that the two telephones used with the apparatus were purchased on August 16, 1901, and that the two Standard phonographs used therewith were purchased on August 25th, 1901. The witness, Ludwig F. Ott, states that the experiments with the first apparatus were made during one of his summer vacations from a school (E. R., p. 7, Q. 4) and that he left school in 1902 (E. R., p. 6, Q. 9). He is sure the experiments were made before he left school (E. R., p. 9, Q. 15). No claim is made that the experiments which were conducted in 1901 embodied the issue of the interference. Those experiments were purely preliminary and were carried on for the purpose of determining the feasibility of recording telephonic messages by means of a phonograph. The experiments were successful and it was then determined to reduce the invention to practical commercial form. As a matter of fact, in the first experiments in 1901, a considerable improvement was made which is thus described by the witness L. F. Ott:—"At first I used an ordinary telephone receiver which was mounted over the recorder so that when the message was received over the line it would be delivered to the diaphragm of the recorder and thereby make a record, but I found that such a record was very faint and at Mr. Edison's suggestion therefore the form of receiver at present on the machine was constructed. With this

receiver the diaphragm, which was vibrated by the recording magnet, was connected directly with the recording stylus of the phonograph so that there was less opportunity for mechanical loss and consequently the records made were considerably louder" (E. R., p. 8, Q. 13). Now, in order to make a loud record on a phonograph, it is evident that the telephone receiver should be of such a character as to give the loudest and most distinct reproduction. No instrument would be better suited for this purpose than the well-known Edison chalk receiver, such as is disclosed, for instance, in Edison's Patent No. 811,367 of November 25th, 1879 (Edison's Exhibit, Chalk Receiver Patent). As is well-known, with the chalk receiver or motograph, an electrode connected with the diaphragm is pressed against a rotating chalk cylinder. It was at first believed that the effect of the electrical impulses in passing between the electrode and cylinder was to generate excessively minute gaseous bubbles which varied in friction between the two surfaces. But Mr. Edison evidently does not accept this explanation at the present time, since he states that "the cause of the movement produced by the electric wave is unknown" (E. R., p. 28, Q. 15). Whatever may be the explanation of the phenomenon, it is of course a fact that in some way the electric impulses vary the friction between the electrode and the chalk cylinder, so as to cause the diaphragm to vibrate with amplified movement. That a motograph is a common form of telephone, that it is a perfectly operative and successful device, and that it has been well-known to the commercial and scientific world for more than twenty years, are facts of which the Patent Office can properly take judicial notice. One difficulty, however, with the motograph was in securing chalk cylinders, which would give uniform results. Mr. Edison states that "Up to the present time I have been unable to produce a dozen cylinders which would give the same results" (E. R., p. 28, Q. 16), and that,

"the chalk, could not be got to give even results, sufficient to make it a commercial success on a railroad telephone line and it was necessary to go into a great deal of experimenting to produce a reliable chalk and such experiments have been continued for many years and are still being made 'now' " (E. R., p. 32, Q. 48). It must not be understood from this evidence that the chalk telegraph is not a perfectly operative and commercially successful apparatus, because every one knows that it is. It is a fact, however, that some cylinders operate more successfully than others and with a device that is to be used for railroad signaling, absolute and unqualified certainty of operation is required, since a single mistake with thousands of instruments transmitting perhaps millions of messages might result in accident and loss of life. As stated by the witness F. P. Ott, "Some of them are fair, but they do not seem to be constant; they do not stand up" (E. R., p. 38, Q. 49). Edison's experiments, therefore, which as he states, are still being carried on, were not to make the telegraph a commercial success, because it has been a commercial success for twenty years, but to secure an instrument in which the possibility of failure would be absolutely removed. In order to test the particular materials which could be used for the chalk cylinders of the telegraph, two separate receivers were made which have been introduced as "Edison's Exhibit, First Chalk Receiver" and "Edison's Exhibit, Second Chalk Receiver." Sketches showing these devices have been introduced (Edison's Exhibit, Sketch of Chalk Receiver) in which various suggestions are made for material out of which to construct the electrodes or pens, and also, two of Edison's notes (Edison's Exhibit Note No. 1 and Edison's Exhibit Note No. 2) making further suggestions of materials from which to construct the electrodes, and also, numerous suggestions of materials from which to construct the friction cylinders. It is not important in this case as to when these chalk receivers were made, or when these sketches and notes were prepared, as

they do not disclose the issue, but they have been offered merely to illustrate the development of the invention here involved. Mr. Edison's attorney, however, states that he witnessed the operation of "Edison's Exhibit Second Chalk Receiver" on May 9th, 1902 (E. R., p. 27). It seems reasonably clear from the evidence, that the two chalk receivers and the paper exhibits relating to them, were made in April or early in May, 1902.

Edison's Reduction to Practice.

Having satisfied himself by his preliminary experiments with the "First Transmitter," the "First Receiver" and the two "Chalk Receivers," that the recording of telephonic speech by means of a phonograph was perfectly practicable, Edison determined upon the construction of a full-sized, complete apparatus, which is introduced herein (Edison's Exhibit Recording Telephone) and upon which he relies as a reduction to practice of all the claims of the issue. Sketches were first made, the first (Edison's Exhibit Recording Telephone, Sketch No. 1) showing the general outline of the phonograph mandrel, the auxiliary driving cylinder, the friction roller, the worm gearing, the chalk roller, and the electrode pressing thereon; the second (Edison's Exhibit Recording Telephone, Sketch No. 2) showing the same parts in still fuller detail and illustrating also the phonograph carriage, the recording device, and the support for the driving shaft, and the third (Edison's Exhibit Recording Telephone Sketch No. 3) illustrating on an enlarged scale, the connection between the telegraph and the phonograph recording device. Although these sketches are somewhat crude, when taken together, they illustrate substantially everything that is disclosed in Edison's application. The first two of these sketches are dated May 29th, 1902, while the latter is dated May, 1902. John F. Ott testifies that these

sketches were explained to him by Mr. Edison at least as early as May 29th, 1902, and possibly earlier (E. R., 17, Q. 17). They must have been received by Mr. Ott sometime previous to May 29th, 1902, because on that day, work on the complete machine was started, the order being known as job No. 1383 (E. R., p. 19, Q. 56—E. R., p. 30, Q. 53). The book extracts relating to this work (Edison's Exhibit Book Extracts) have been offered in evidence (E. R., p. 50) from which it appears that the first work on the machine was done during the week ending June 4th, and the final work during the week ending July 30th, 1902. Frederick P. Ott testified that he witnessed the construction of the machine (E. R., p. 40, Q. 70), that it was built in the laboratory (Q. 71) and that "we worked on it for a month I guess" (Q. 74). His attention being called to the fact that the record books show that he was employed on the work from June 4th, 1902, until June 30th, 1902, he states that the machine was constructed during that period (E. R., p. 41, Q. 84). J. F. Ott states that the machine was built "About May, 1902, as near as I now remember" (E. R., p. 16, Q. 40). Mr. Edison says that the machine was built some time in 1902 (E. R., p. 31, Q. 58). Warren testifies that he left the Columbia University in the spring of 1902, entered Mr. Edison's employ at that time, went to work with the Edison Portland Cement Company as electrical engineer, and returned to the Laboratory about September 1st, 1902 (E. R., p. 44, Q. 2). On his return to the Laboratory either in September or October, 1902, he saw the completed machine (E. R., p. 45, Q. 9-10) which was then in the same form as it is now. The testimony offered by Edison makes it perfectly clear, we think, that the exhibit "Recording Telephone" was constructed in June, 1902, and certainly before September or October of that year. Having constructed the complete machine, a test thereof was not necessary in view of the preliminary tests that had already been made. Edison had deter-

mined the practicability of recording telephone messages on a photograph and he knew that both a photograph and a motograph were perfectly operative devices. The only test necessary therefore was to determine the mechanical efficiency of the devices and this was done. Edison (E. R., p. 31), testifies as follows:

"Q. 39. What, if anything, was done with the machine after it was finished?

"A. Just tested to see whether the mechanism was all right.

"Q. 40. What kind of a test did you make of it?

"A. Just ran it back and forward.

"Q. 41. Did you find that it operated satisfactorily?

"A. Yes; it operated all right."

Concerning these tests F. P. Ott (E. R., p. 40), testifies:

"Q. 78. After Edison's Exhibit Recording Telephone was constructed, what was done with it?

A. Turned over to me and we took it down to the Galvanometer Room and ran it and tested it, and as far as the machine went it was all right.

"Q. 79. How did you operate this machine, by hand or by the electric motor in it?

"A. By the electric motor in it.

"Q. 80. How long did you operate it?

"A. We ran it for about fifteen or twenty minutes to see everything ran all right.

"Q. 81. How did it work?

"A. Everything worked all right.

"Q. 82. Did you operate it long enough to cause the carriage to travel one or more times across the mandrel?

"A. Oh, yes, sir.

"Q. 83. Did you find during this operation that the chalk wheel was turned properly?

"A. Yes, sir."

The mechanical tests which were thus made were under the circumstances all that were necessary. It was not necessary to test the chalk phonograph nor was it necessary to test the chalk receiver. These devices were of known operativeness and they had already been tested in the preliminary experiments which were made prior to the construction of the complete machine. Furthermore, it will be observed that the exhibit is identical with the Patent Office drawings. In fact, the latter were made from the machine. No question has been raised by the Examiner, nor could any question be raised, by him, as to the operativeness of the device illustrated in the application, and therefore it follows that no question can be raised as to the operativeness of the complete machine. To question the operativeness of the latter device, would be to question the operativeness of the device of the Edison application, which is obviously a matter relating to interference and to applicant's right to a claim and not to a matter of priority of invention. Furthermore, Mr. Warren, who is an electrical engineer, testifies as follows (E. R., p. 45):

"Q. 13. Did you ever examine this machine from the standpoint of an electrical engineer?"

"A. Yes, sir."

"Q. 14. Is this machine in your opinion an operative machine?"

"A. Yes, sir."

"Q. 15. Are you familiar with the construction and operation of the chalk receiver?"

"A. Yes, sir."

"Q. 16. Have you ever operated the chalk receiver?"

"A. Yes."

"Q. 17. If the machine before us is of such mechanical construction that on the turning of the mandrel the chalk receiver will slowly rotate, do you entertain any doubt if vibrations corresponding to sound waves are received at the electrode

of the chalk receiver, the vibration set up and communicated thus to the recording stylus would be recorded on the phonograph?"

"Question objected to as without sufficient foundation."

"A. No; there could be no doubt about it."

And, on cross-examination (E. R., p. 56), Mr. Warren says:

"x-Q. 18. Is it your understanding that the exhibit concerning which you have testified, 'Edison Exhibit, Recording Telephone', is at present in such condition that if connected with telephone wires in circuit and having a blank cylinder on the mandrel, you could thereby record a record on that cylinder?"

"A. (Witness examines the machine carefully). Yes."

After having constructed and sufficiently tested the complete machine, Mr. Edison states that it was set aside (E. R., p. 31, Q. 42) for the purpose of continuing "the experiment with the chalk to produce a commercial application of the motograph principle to the special application of the motograph principle to the apparatus" (E. R., p. 32, Q. 43). The machine, however, was finished, the invention had been complete and reduced to practice and was a proper subject for a patent application. The Patent Office is certainly familiar with the fact that Mr. Edison is a frequent applicant for patents. He was, in fact, at one time referred to as the "man who kept the steps of the Patent Office hot with his footstep." He has ample means to file all applications that may be necessary to cover his inventions. Why then, after having completed the machine did Mr. Edison wait until September 15th, 1905, before attempting to patent the same? He says: "I thought I had applied for a patent. I remember writing out the specifications, and I believe I sent them to New York, but somehow, by change of patent lawyers and

such, I found it was never filed" (E. R., p. 32, Q 44). He testifies:

"Q. 46. When I called your attention to the fact that an application had not been filed on this machine what was done?"

A. I insisted that it was, and I believe a search was made over in New York to find out.

Q. 47. Was the application then filed?

A. It was then immediately filed, when no record could be found of the previous filing?"

E. R., p. 32.

In this statement Mr. Edison is corroborated by his attorney, who testifies as follows:

"Shortly before the Edison application was filed, and certainly not earlier than September 1, 1905, I observed in the Galvanometer Room of the Edison Laboratory the piece of apparatus which has been introduced herein as 'Edison's Exhibit, Recording Telephone'. In the Galvanometer Room were a large number of experimental and commercial apparatus, representing part of Mr. Edison's work as an inventor. The exhibit in question was then in the same condition as it is now, and so far as I could see, it appeared to be completely finished and a perfect piece of apparatus. I called Mr. Edison's attention to the exhibit and asked him what it was, and he informed me that it was a recording telephone for the purpose of recording telephone messages on a photograph, and that the invention was to be used in connection with railroad signaling. I asked him why he had not filed an application for a patent on the device and replied that he had. I informed him that no application had been filed to my knowledge, nor had I ever heard of the apparatus before, but he insisted that he was right, and that the records in my office in New York

would disclose the fact. I thereupon had a search made through the records of my New York firm, Messrs. Dyer & Dyer, 31 Nassau Street, but nothing was found to substantiate Mr. Edison's belief. Mr. Edison explains his failure to file the application to the possible fact that in changing his attorneys the matter may have been overlooked. I came to the Laboratory to take charge of Mr. Edison's work on April 1, 1908. For some months prior to that time Mr. Edison had repeatedly urged me to take charge of his work personally, as he was dissatisfied with having the work done in New York, and I finally consented to do so" (E. R., pp. 47, 48).

From the evidence produced on behalf of Edison, it is submitted that reduction to practice of the invention as early as the summer of 1902 has been shown; that such reduction to practice was effected by the construction of a full-sized, complete and operative device; that having constructed such a device it was Edison's intention to immediately apply for a patent thereon; that by reason of a change in his attorneys that was not done, although he labored under the impression that it had been done; that as soon as the fact was discovered that no application was filed, immediate steps were taken to remedy the omission, and that far from their being any attempt on Edison's part to conceal or suppress the invention or to abandon it to the public, the evidence shows the clearest intent to patent the device, and thereby put the public in possession thereof.

Macdonald's Case.

Particular attention should be directed to Macdonald's preliminary statement, as that is the sworn state of facts to which his case must be restricted. It is not necessary to call attention to any authorities in support of the proposition that a preliminary state-

ment must always be presumed to have been prepared with the utmost care, and that no testimony can be accepted materially at variance therewith. The statement says:

"I conceived the invention specified in the several counts of said interference in the latter part of the year (December) 1900. I cannot fix the date with greater precision. I discussed said invention with others at that time and also during the months of January and February, 1901. During these months I gave instructions for experimental work relating to this type of machine to several of my laboratory assistants and many experiments (relating mainly to the friction devices) were made during the first half of the year 1901. I do not know whether any sketches were made at that time, my recollection being that I communicated my instructions orally. The first complete machine embodying the invention was begun in July, 1901, and completed and tested in August of that year. *This was a reduction to practice of the said invention.* No model, as distinguished from full-sized machine, was made. I began immediately (that is, in August, 1901) to construct a second machine embodying the invention, and in that connection made sketches illustrating certain modifications which I desired to have embodied therein. This was followed by other machines, each embodying some improvements over the preceding constructions, but there being no material change in respect of that part of the invention which is involved in this interference. Work on machines for the market began in the summer of 1904, and since that time a number of such machines have been manufactured and sold in the regular course of business" (M. R., pp. 1-2).

It will be observed from this statement that some facts are alleged emphatically, and others with ap-

parent hesitation. For instance, Macdonald is somewhat uncertain as to the date of conception, but believes it was in December, 1900. He is perfectly certain that during the first half of the year 1901, that is, from January to June, he was engaged in experimenting particularly with the friction devices; he is not certain whether sketches were made, but he believes not. He is absolutely certain that the first complete machine was begun in July, 1901, and finished in August, 1901, and that by this machine the invention was reduced to practice. He is also certain that in August, 1901, he began the construction of a second machine, which was followed by other machines and that work on machines for the market began in the summer of 1904. Now, in the consideration of the Macdonald case we are met with a very significant fact. *He does not prove the construction of the machine on which he relies as reduction to practice; he does not explain why that machine is not produced, and he does not prove the construction of the second machine that was commenced in August, 1901.* On the contrary, we find that Macdonald's proofs are limited to experimental apparatus constructed during the first half of the year 1901, as to which no claim of reduction to practice is made and which, according both to the preliminary statement and to Macdonald's testimony, were abandoned experiments. In other words, Macdonald's testimony shows that while he may have conceived the invention prior to Edison, he did not reduce it to practice until long after Edison's reduction to practice, and he has made no attempt to connect his conception with his reduction to practice by a showing of diligence, as is necessary under all the authorities.

Conception.

Macdonald states (M. R., p. 5, Q. 5) that the conception of the invention was the result of the examination of a machine which was shown to him by Daniel

Higham at the office of the Columbia Phonograph Company, about December 1, 1900. Mr. Higham, however, states that he did not show this machine to Macdonald until about July, 1901 (M. R., p. 26, x-Q 17, x-Q 18, x-Q 19). Macdonald's date of conception, is therefore, not corroborated and cannot be accepted.

Macdonald's Exhibit No. 3.

Macdonald states that this exhibit was constructed in December, 1900 (M. R., p. 9, Q. 22), but since this is before any date alleged in the preliminary statement, it cannot be accepted. Furthermore, Macdonald admits that the exhibit is not operative (M. R., p. 12, Q. 43) and nothing appears in the testimony as to what its complete construction may have been. The witness Byrnes, however, testifies that it was "a secondary experiment" (M. R., p. 2, Q. 12).

Macdonald's Exhibit No. 1, 1901 Machine.

Concerning this exhibit, Macdonald states (M. R., p. 6, Q. 5):

"This machine was completed and operated early in the spring of 1901. If it is the date of completion of this machine also by the fact that on the first of May, 1901, there was begun a machinists' strike which lasted about three months.

All of my workmen in the Laboratory went out on this strike, which, of course, included the two men who had worked on this machine. The machine, however, was completed and operating for some time before the beginning of this strike."

Osborne states that he saw the exhibit in the early part of 1901 (M. R., p. 16, Q. 4), and that Mr. Plimmer commenced work on it in January, 1901. He saw

the machine and heard it operate before the machinists' strike (Q. 20). Byrnes also saw the machine operate before the strike, although he incorrectly fixes the date in 1902 (M. R., p. 21, x-Q 26). Hockley saw the machine about September, 1901 (M. R., p. 22, Q. 4) and heard it operate at that time. It seems to be established with reasonable certainty, therefore, that this machine was constructed and operated by Macdonald before the machinists' strike in May, 1901, but it is equally clear that the machine was at best merely an abandoned experiment on which Macdonald can only rely for conception and not a reduction to practice. The reasons for this conclusion will be briefly discussed:

(a) The machine was constructed during the experimental period, namely, "the first half of the year 1901," as set forth in the preliminary statement, and it clearly cannot be the machine which was constructed in July and August of that year, and which was claimed as a reduction to practice of the said invention. If, however, this is the machine that is set out in the preliminary statement as having been constructed in July and August, 1901, it does not so appear from the evidence; no attempt has been made to amend the preliminary statement; and no explanation is offered why an incorrect date was alleged in the preliminary statement. Accepting Osborne's testimony that he saw Plimmer working on the machine in January, 1901, there is too much of a discrepancy between that date and July, 1901, when Macdonald states that the machine was started on which he relies for reduction to practice; to assume that the two machines are one and the same. Furthermore, to accept the machine as an abandoned experiment, and not as a reduction to practice, is perfectly consistent with all the facts of the case.

(b) Macdonald states (M. R., p. 6, Q. 8) that the machine "was built from oral instructions, which has been my practice in experimental work."

(c) Being asked (M. R. p. 12, x-Q. 44) why he waited

from the time of construction of this exhibit until December 21, 1904, before applying for a patent, Macdonald replied: "The friction device was not of my invention. I had experimented with it considerably but never succeeded in producing a machine that I considered commercial, and the devices were set aside as an uncompleted experiment; but when Mr. Higham, however, appeared in 1904, with a vastly improved friction device, I then saw that the commercial problem had been solved. I applied Mr. Higham's new device to my invention of 1900 and 1901 and produced a practical machine, for which patent was applied for."

The attempt to minimize this answer in Macdonald's re-direct examination was entirely ineffective, since the issue does not cover broadly mechanism of rotating the friction device, but relates specifically to a phonic apparatus. No clearer admission could possibly be made than that the exhibit was tried and found wanting, and was, therefore, laid aside. It was not until 1904 that Macdonald saw that an operative device could be made, not as a result of his own experiments, but because of Mr. Higham's improvements. If Higham had never made the improved friction device, the Macdonald machine would still be in the scrap heap. Possibly, if the machine had been reclaimed from oblivion prior to Edison's reduction to practice and the improvements were then applied to it, could he relied upon as a reduction to practice, but it would be absurd to say that if Higham had not made his improvements even at the present time, but they still existed in future, Macdonald could years from now hark back to his original experiment, reclaim it from the dust of neglect, and rely upon the machine as so recovered as a reduction to practice as of its original date.

(d) The witness Byrnes refers to the fact that "Macdonald's Exhibit No. 2" was a secondary experiment, and the inference is that the exhibit under consideration was also an experiment (M. R., p. 20, Q. 12).

(e) The witness Wilson, referring to the exhibit, states that after the strike he saw certain parts of the machine (M. R., p. 28, Q. 7), from which it would appear that the machine was then dismantled. It is true that the witness later in his deposition (Q. 11) expresses doubt whether he saw the parts of the identical machine or parts of a similar machine, but the testimony is perfectly consistent with Macdonald's statement that the machine was "set aside as an uncompleted experiment."

Macdonald's Exhibit No. 3.

Macdonald does not say when this exhibit was made. Osborne states that he saw Macdonald's Exhibit No. 2, possibly as early as 1902 (M. R., p. 18, re-d. Q. 80), and that he saw Exhibit No. 3 "at the same time" (re-d. Q. 37). This was after Edison's reduction to practice. Byrnes states that he saw Exhibit No. 3 about the same time as the other exhibits (M. R., p. 20, Q. 15), but his recollection as to dates is uncertain, since he is positive that the strike in question was in 1902 (M. R., p. 28, x-Q. 27).

Macdonald's Other Experimental Work.

Macdonald states (M. R., p. 8, Q. 19) that in 1902 he constructed a second machine substantially like Exhibit No. 1, but that the machine is not now in existence (Q. 20). No specific date in 1902 being given, the construction of this machine, if material, must be considered as subsequent to Edison's reduction to practice. No corroboration as to the construction of this machine appears in the evidence. From what has already been said concerning Macdonald's work prior to Edison's reduction to practice, it is clear that it represents nothing more than a conception of the invention, even if it goes that far. It is difficult to see how

conception can be based on an uncompleted experiment or how Macdonald can be said to have had a conception of the invention of the issue in 1901 when it was not until 1904, two years after Edison reduced to practice, that Higham appeared with his perfected friction device and made an operative device possible. Also, too much emphasis cannot be laid on the fact that Macdonald has not produced a shred of evidence as to the construction of the machine which he says in his preliminary statement was built in July and August, 1901, and on which he was to rely for a reduction to practice, nor on his failure to produce the second machine, which he states was commenced in August, 1901. The failure of Macdonald to produce such important exhibits or to satisfactorily explain his failure to do so, can have but one interpretation, and that is that if the exhibits had been produced they would necessitate an unfavorable conclusion. Certainly Macdonald goes too far in assuming that the Office will regard as a reduction to practice a machine, or series of machines, constructed during the period of experimenting and which, on Macdonald's own admission, are either fragmentary or were regarded as uncompleted experiments. The best that can be said for Macdonald's case is that these uncompleted, incomplete and abandoned experiments may indicate a very vague conception of the invention some time in 1901. This comprises all of Macdonald's work prior to Edison's reduction to practice. Let us now see when Macdonald reduced the invention to practice and having inquired as to that fact, let us then ascertain if, under the authorities, Macdonald has properly assumed the burden of proof and has connected his conception with his reduction to practice by a showing of reasonable diligence.

Macdonald's Work After Edison's Reduction to Practice.

Macdonald states that the improved Higham devices were brought to his attention in June or July, 1904 (M. R., p. 10, Q. 28), and that he subsequently constructed a machine embodying those improvements (Q. 29), but that the machine is not now in existence (Q. 30). When this machine was constructed does not appear from the evidence. About September 1, 1904, a drawing was made (Macdonald's Exhibit No. 4, Discript of 1904, M. R. p. 11, Q. 32), from which the Patent Office drawings were made, the application being filed on December 21st, 1904. The construction of machines for the market was commenced in December, 1904 (Q. 34), but it does not appear whether this was before or after the filing of the application. The making of the drawing of September 1, 1904, is corroborated by the draughtsman, Hinchley (M. R., p. 28, Q. 15). From this review of Macdonald's case the following facts very clearly appear:

(1) Anything that may have been done by Macdonald prior to Edison's reduction to practice was in the nature of abandoned experiments. Possibly, although it is very doubtful, these experiments may be made the basis of a claim to conception.

(2) Macdonald did not reduce to practice until December 21, 1904, when his application was filed.

(3) Granting that the work in 1901 may indicate conception of the invention, nothing was done by Macdonald until September, 1904, more than two years after Edison's reduction to practice. At the date of Edison's entrance on the field, Macdonald was absolutely idle, when, under the authorities he should have been diligent. His early experiments were set aside until Higham could make them complete. Unfortunately for Macdonald, Higham did not complete his work until June or July, 1904, so that the long

period of three years between the construction of the experimental machine and Higham's appearance is entirely unexplained. Under these circumstances, it is not seen how, by any of the well-known rules in interference practice, any conclusion can be reached other than that the award of priority should go to Edison.

POINT 1.

As to the first count, priority must clearly be awarded to Edison.

Edison's recording telephone, both as disclosed in his application and in the complete machine, is a *recording* apparatus and nothing else. The first count is specifically limited to a *recording* surface, and by necessary implication to a *recording* stylus. The exhibit "Recording Telephone" is an actual reduction to practice of the count, and the Edison application a constructive reduction to practice thereof. There is not a word of testimony by Macdonald that he ever had a conception of a recording apparatus within the terms of this count before Edison's reduction to practice, so that Edison stands in the position of the first to conceive and the first to reduce to practice. Macdonald's whole record may be searched in vain for a shred of testimony in support of this count. All, in fact, that Macdonald has to rely upon is the single statement of his application that the invention "relates to machines *recording and reproducing sounds*," but a recording machine is not specifically described, and it has been pointed out that to convert the reproducing machine shown therein to a recording machine, would be a difficult accomplishment and would require independent invention. Not only must Edison be regarded the

first inventor of a machine complying with the limitations of the first count, but as the *only inventor*, since up to the present time Macdonald has produced no evidence on which a claim to inventorship may be based. The vague and general statement in the specification can indicate nothing more than a possibility that the machine might be modified so as to record sounds. Certainly that statement is not sufficient to support a specific claim limited to recording mechanism.

POINT 2.

Macdonald's work in 1901 was purely experimental and was so hopeless that the entire enterprise was laid aside for three years. The invention was completed by Higham. Under these circumstances, the work of 1901 did not even amount to a conception of the invention.

We assert in confidence that if it was not until 1904 that the invention was completed, the abandoned experiments of 1901 cannot be regarded as a sufficiently complete embodiment of the invention to offer a satisfactory basis for a claim to conception. As Macdonald states, the invention was then "uncompleted."

It was not completed until Higham appeared in June or July, 1904. If Higham had never appeared, the invention would presumably never have been completed. The issue necessarily contemplates a completed invention, since the Office, except in caveats, does not recognize inchoate and half-baked schemes. The possibility of a completion of the invention not arising until June or July, 1904, there could have been

no conception of a complete invention in 1901, unless we attribute to Macdonald the gift of second-sight and assume that in 1901 he knew what Higham would bring forth in 1904.

In *Mergenthaler vs. Souder*, 81 O. G., 1417, the Court of Appeals, defining the completeness of a conception of an invention, said:

"A complete conception as defined in an issue of priority of invention is matter of fact and must be clearly established by proof. The conception of the invention consists in the complete performance of the mental part of the inventive act. All that remains to be accomplished in order to perfect the act or instrument belongs to the department of construction, not invention. It is, therefore, the formation in the mind of the inventor of a definite and permanent idea of the complete and operative invention as it is thereafter to be applied in practice that constitutes an available conception within the meaning of the patent law (1 Rob. on Pat., sec. 375).

They quote with approval the following statement from *Garrison & Everett vs. I. R. Brick*, 1871 O. D., 89:

"The point of time at which invention, in such sense as to merit the protection of law, dates is neither when the first thought of it is conceived nor when the practical working machine is completed, but it is when the thought or conception is practically complete; when it has assumed such shape in the mind that it can be described and illustrated; when the inventor is ready to instruct the mechanic in relation to putting it in working form; when the 'embryo' has taken some definite form in the mind and seeks deliverance, and when this is evidenced by such description or illustration as to demonstrate its completeness. * * *

The true date of invention is at the point where the work of the inventor ceases and the work of the mechanic begins. Up to that point he was inventing, but had not invented, and he must have invented before the law will come to his protection."

See, also, *Herman vs. Fullman*, 107 O. G., 1094, and *Edgerhead vs. Hansen*, 108 O. G., 709.

In this aspect of the case, Edison is the first to conceive and the first to reduce to practice, and, therefore, must prevail.

POINT 3.

Admitting that Macdonald's work in 1901 was a conception of the invention, there is no showing of reasonable diligence connecting that conception with the constructive reduction to practice of December 21, 1904.

It has been shown from Macdonald's own testimony that during the three years between 1901 and June, 1904, absolutely nothing was done by him towards the development of the invention, but that the early experiments were still withheld as uncompleted. During this period, Edison entered the field, conceived the invention, made drawings of it, disclosed it to others and completely reduced it to practice. In this aspect of the case, priority of invention must be awarded to Edison.

POINT 4.

In view of the positive declarations of Macdonald's preliminary statement, his experimental work, prior to May, 1901, cannot be regarded as a reduction to practice. Furthermore, his admission that the early machines were set aside as "an uncompleted experiment" must outweigh any testimony as to their success or operativeness.

The testimony must conform to the preliminary statement. If any other practice is permitted, a preliminary statement becomes a mere idle ceremony. When the preliminary statement says that experiments were made at one period and that the invention was reduced to practice at another period, the construction of machines during the first period and prior to the second period, can only be regarded as part of the experimental work, even if Macdonald had not specifically so characterized them. In *Fowler vs. McParty*, 125 O. G., 1016, the Court of Appeals said:

"When the Patent Office has refused to allow him to file an amended statement, any attempt to prove the earlier dates is contrary to the rules of the Patent Office and to the general rules applicable to pleading in courts of law. *Such testimony must be disregarded.* For to pursue this course and naturally even his testimony, which is within the allegations of his preliminary statement, is very closely scrutinized."

The fact that Macdonald has not attempted to amend his preliminary statement, does not in any way affect the applicability of this doctrine. It would be absurd to say that because he has elected to stand on his preliminary statement as filed, he should be per-

mitted to disregard it, while, if he had attempted to amend the statement and failed, he would be bound by the dates originally alleged by him. Manifestly, if Macdonald seeks to give to the testimony such a color as to support a claim for a reduction to practice on his experimental work of 1901, that testimony must be disregarded. If it is to be regarded at all, it can only be as evidence of conception, and on that point there is grave doubt.

POINT 5.

Even if Macdonald's testimony can be accepted in disregard of his preliminary statement, and if we overlook his admission that his work of 1901 was an abandoned experiment, the 1901 machine (Exhibit No. 1) cannot be regarded as a reduction to practice.

Macdonald admits that it was not until 1904 when Highnam produced his improved friction device that his machine became practical enough to warrant filing an application thereon. Whatever may be the construction of the machine at the present time, with the improved attachments, it is clear that in 1901 it was not complete, nor was it so regarded by Macdonald.

In *Swihart vs. Mauldin*, 192 C. D., 137, the issue included a plugger, but contained no limitation as to the material of which it was to be made. Swihart constructed twelve scales with plungers of hard rubber, and they were shipped to customers, tried and returned, as they failed to weigh properly. "After they were returned Swihart learned indirectly from one

Legauko that graphite could be used in making the plungers, and would operate with less friction. He thereupon introduced this feature into his scales and found that they were then satisfactory; but this was after Maslin had obtained the same information from Legauko and had successfully reduced the invention to practice." Held, under these circumstances that the machines as first constructed by Swihart were not a reduction to practice, but were abandoned experiments. The present case is very similar to *Swihart vs. Maslin*, because here we have a completion of the invention by the suggestions of Higman, subsequently to Edison's reduction to practice. If Legauko had never suggested to Swihart, or if Swihart had never ascertained that the plungers could be made of graphite, the twelve scales originally constructed by Swihart would never have passed out of the domain of abandoned experiments. So, in the present case, if Higman had never suggested to Macdonald how the friction devices could be made practical, Macdonald's invention would never have been reduced to practice.

In *Gallagher Jr. vs. Hen*, 115 O. G. 1330, the Court of Appeals, in defining what constitutes reduction to practice, said:

"Nevertheless it is essential that a device to constitute a reduction to practice must show that 'The work of the inventor must be finished physically as well as mentally. Nothing must be left for the inventive genius of the public' ". (Robinson on Patents, Vol. 1, page 183.)

In *Macdonald vs. Edison*, 105 O. G. 973 (a prior interference between these parties on a different subject matter), the present Commissioner had occasion to refer to an exhibit introduced by Macdonald under the same circumstances as the present 1901 machine. In that case it was claimed that a certain machine was a reduction to practice. The Commissioner said:

"In answer to x Q. 1. Macdonald himself admits that the tests were mere 'laboratory experiments' and that his work on the duplicating-machine was not then pressed. In the last portion of his answer to Q. 30 Macdonald says that the work on the duplicating-machine (the machine in issue) and the recording machine was completed at practically the same time, as the work on both was carried on simultaneously.

In answer to x-Q. 1, it is stated that 'when the two machines were completed (he received instructions) to lay aside for the time being all work except the getting out of the Grand machine itself * * * and Grand records. The work upon the duplicating-machine was therefore not pressed outside the laboratory experiments'.

"If the duplicating machine was at that time a complete machine capable of successfully performing the work for which it was intended and which needed no further work to be done on it in order to perfect it, there could be no further work for Macdonald to do. It is difficult to see, therefore, how work could be laid aside when it was already completed. The answer to x-Q. 1 raises a presumption that the reduction to practice claimed for Macdonald was not in his own opinion actually complete at that time, for the reason that if there was no more work to be done, there could be no necessity for laying the work aside."

In the present case Macdonald states that the devices were set aside as an uncompleted experiment, so that as the Commissioner in the former case said, it is difficult to see how those devices could be complete, since, if they were complete, there would be no necessity of setting them aside. Yet, if the 1901 machine is to be relied upon as a reduction to practice, it must be shown to have been complete, which Macdonald admits it was not. The former interference shows that Macdonald seems to believe that an uncompleted ex-

periment can be regarded as a reduction to practice. The Patent Office and the Court of Appeals hold very distinctly to the contrary, and it is thought that the same holding is applicable to the present case. Certainly, a machine that was deliberately set aside as an uncompleted experiment cannot not now be regarded as a complete embodiment of the invention.

POINT 6.

Macdonald may argue that Edison's complete machine cannot be regarded as a reduction to practice, because the machine was not tested except to determine the operativeness of the mechanism for rotating the chalk roller. The reply is that no such tests were necessary under the circumstances.

We have pointed out in the present case that in a broad sense Edison's invention comprises a phonograph and chalk telephone, both of which are perfected devices, and have been known to be such for twenty years. For instance, in Knight's *Mechanical Dictionary* (Boston, 1884), the chalk telephone is illustrated at Figure 2409, plate XLVIII., and is described on page 893 as follows:

"The chalk cylinder is inclosed in a vulcanite box at the end of the movable arm. The cylinder when once moistened remains in that condition an indefinite time, as the box is practically airtight. The small shaft that runs parallel with the iron arm extends through the side of the box and carries the chalk cylinder. Upon the opposite end there is a small piston moved by a worm, the crank of which is turned by the finger."

In Appleton's *Cyclopedia of Applied Mechanics* (New York, 1885) two forms of motograph are shown in figures 4114 and 4115. The article describing the instrument (page 892) says:

"About the year 1872 Dr. T. A. Edison made the discovery that if a strip of paper, moistened with a chemical solution that is readily decomposed when a current of electricity is passed through it, be drawn over a metal plate connected with the positive pole of a voltaic battery and beneath a platinum style, bearing upon it with a gentle pressure, and which can be connected to the negative pole by means of a key or contact maker, whenever the current is allowed to pass the friction is instantly reduced between the surface of the prepared paper and the platinum style, to be immediately restored the moment the current is again interrupted; from which it follows that if the paper be drawn with a uniform tractive force below the style, it will slip whenever an electrical current is transmitted through it, and will be retarded again by a fractional resistance the moment that the current ceases to flow. This discovery has been applied by Dr. Edison to the construction of a telephone which is remarkable for the loudness and clearness of its tones. Figure 1114 is a diagram showing the arrangement of the device. The cylinder A is composed of precipitated chalk to which a small proportion of acetate of mercury is added; the whole being moistened with a saturated solution of caustic potash, and moulded into a cylindrical form by being subjected to hydraulic pressure. This cylinder is mounted upon a horizontal axis B, and is made by suitable mechanism to revolve beneath a metallic strip C, which is maintained with a uniform pressure by an adjustable spring S against the surface of the chalk. At the point where the

strip rests upon the cylinder, a small plate of platinum is fastened, the opposite end of the strip is attached to the centre of a diaphragm of mica D, 4 inches in diameter, firmly fixed in the framing of the instrument by its circumference.

By connecting the strip to the zinc element of a voltaic battery, and the chalk cylinder to the copper pole, and rotating the cylinder at a uniform speed away from the diaphragm, it will be found that, when no current is passing, the friction between the undusted surface of the chalk and the platinum strip is sufficient to drag the centre of the diaphragm inward, and it will take up a fixed position of equilibrium when the frictional pull in the centre of the diaphragm is equal to the elastic tension of the strained diaphragm. The moment, however, that an electric current is allowed to pass between the strip and the cylinder, electro-chemical decomposition takes place, the friction between them is reduced, and the diaphragm, finding its elastic tension unopposed, flies back to a second position of equilibrium dependent upon similar conditions; and if a variable or undulatory current of electricity be transmitted through the instrument, the diaphragm will be kept in continual motion by the constantly varying friction existing between the chalk and the platinum, dragging the diaphragm in opposition to its own constant elastic tension."

"The form of chalk receiver or magnetograph above described, is practically identical with the device shown in Edison Patent No. 221,957 of November 25th, 1879, introduced herein. In view of the well recognized operativeness of a phonograph and of a chalk telephone, we submit that if no tests whatever had been made of the complete apparatus they would not be necessary, since it is perfectly evident from an inspection of the machine that when the usual phonographic devices are operated, the chalk cylinder will be turned.

In the case of simple mechanical devices of this kind actual test is not necessary to support a claim for reduction to practice.

In *Mason vs. Hepburn*, 84 O. G. 147, the Court of Appeals said:

"At the same time, some devices are so simple and their operativeness and efficacy so obvious that the complete construction of one of a size and form intended for and capable of practical use might well yet be regarded as a sufficient reduction to practice without actual use or test in an effort to demonstrate their complete success or probable commercial value."

In *Herman vs. Fulton*, 107 O. G. 1024, the present Commissioner of Patents said:—

"The invention here is a mere attachment to automatically turn out the light when it reaches the bottom of the printing frame and is of such a character that it might almost be said that a practical test was not necessary to demonstrate its practicability."

In *Gallagher, Jr., vs. Huen, supra*, the Court said:

"Nor is it always essential that actual tests of the invention be made in order to complete the inventive act (*Mason v. Hepburn*). The device relied upon as a reduction to practice must, however, if it has not been worked, clearly be capable of work, and not have been a mere experiment."

POINT 7.

The tests that were made were sufficient for the purpose. It was not necessary to test the phonograph nor the chalk telephone.

Both Edison (E. R., p. 31, Qs. 391, 40 and 41) and F. P. Ott (E. R., p. 40, Qs. 78-89) testified that after the construction of the machine it was operated to see if it was mechanically efficient, and these tests were successful. That was all that was necessary.

They had already been experimenting with chalk telephones and with recording telephones for more than a year, and they were both familiar with the construction of phonographs and chalk telephones for more than twenty years. To have connected up the telephone and recorded on the phonograph would have been a mere waste of time. There could never be a question about the operativeness of the combination, nor has there been a question about its operativeness; and to hold that the complete machine is not operative would be to declare that a phonograph or a chalk telephone was not an operative device. We do not believe that the Patent Office would undertake the responsibility of so characterizing well-known commercial machines which have been before the public for the past thirty years. Furthermore, the testimony of Warren must not be lost sight of on this point. That witness speaks as an expert and without interest or bias, and he states without qualification, after having carefully examined the complete machine (E. R., p. 46, x-Q 17-x-Q 18) that he is familiar with the machine, that it was perfectly operative in October, 1902, and that it is perfectly operative now. Certainly the testimony concerning the operativeness of this machine is sufficient to demonstrate the point, at least *prima facie*, and to impose upon Macdonald the burden of proof of showing that the machine is not operative.

Macdonald has not undertaken to do that, nor in fact, has he ever questioned the successful operativeness of the complete machine, and it is possible that he may not do so. The point is discussed, however, as a matter of precaution.

POINT 8.

Operativeness of the complete machine, even if it has not been proved, would necessarily be presumed from the fact that the machine and the disclosure of the application are identical.

A comparison of Edison's Exhibit Recording Telephones with the drawings of the Edison application will show that the drawings were made from the machine. The Edison application constituting a constructive reduction to practice, it manifestly follows that an identical physical embodiment of the same invention must be an actual reduction to practice. To question the operativeness of the actual embodiment of the invention would carry with it a question of the operativeness of the application. No such question has been raised either by the Patent Office or by Macdonald. Should that question be raised, it would relate not to priority of invention, but to Edison's right to make the claim. A somewhat analogous question raised in *Rolfe vs. Hoffman*, 121 O. G., 1850, where the Court of Appeals said:

"The Patent Office raises no question that Rolfe has fully described an operative device, and when that device shown and described in the application for the patent is substantially the same as the device made in December, 1901, that fact, at least in the present case, is persuasive that the device

belong to that class of simple devices where it is not essential that actual tests of the invention be made in order to complete the inventive act."

POINT 9.

Edison's prior reduction to practice in 1902, being established, did he by his failure to file an application until 1905 lose his right to the invention in favor of Macdonald, who, in the meantime had constructively reduced to practice?

As to this doctrine, much has been said in recent years, both by the Patent Office and by the Court of Appeals, commencing with *Mason vs. Hepburn*, 84 O. G., 147. In this case the doctrine was announced as follows:

"Considering then this paramount interest of the public in its bearing upon the question as presented here, we think it imperatively demands that a subsequent inventor of a new and useful manufacture or improvement who had diligently pursued his labors to the procurement of a patent in good faith and without any knowledge of the preceding discoveries of another, shall, as against that other, who has deliberately concealed the knowledge of his invention from the public, be regarded as the real inventor and as such entitled to his reward."

In *Thompson vs. Weston*, 1901, C. D., 24, Mr. Commissioner DUELL announced the rule as follows:

"Where an inventor has reduced an invention to practice, applied for and obtained a patent and given the benefit of the invention to the public, a cloud should not be thrown on that patent by giving a *pro forma* award of priority to his rival

who comes into the Patent Office after seeing the patent and introduces as evidence of his claim to priority, a device made long before the patent, but kept secret and not given to the public."

And, in the same case on appeal, 1903, C. D. 521, the Court of Appeals held that the facts were squarely within the doctrine of *Mason vs. Hepburn*, and said:

"The particular object of the beneficence of the patent law is the individual who first conceives, and with diligence perfects an invention. And where one has completed the act of invention his right to the reward in the form of a patent becomes complete save in two instances that may be satisfactorily shown to exist. First, he loses the right as against the public in general by a public use for the statutory period. Second, by deliberate concealment or suppression of the knowledge of his invention he subordinates his claim, in accordance with the general policy of the law in the promotion of the public interest, to that of another and *bona fide* inventor who during the period of inaction and concealment shall have given the benefit of the discovery to the public. Viewed in the light of 'the true policy and ends of the patent laws,' the latter is the first to invent, and therefore entitled to the reward.

See, also, *Fefel vs. Stocker*, 1901, C. D. 269.

In *Matthes vs. Burke*, 111 O. G. 1363, the doctrine of *Mason vs. Hepburn* was modified to the extent of being applied in a case where both parties are applicants, but where the first to reduce to practice waits "until he learns that his rival is using it commercially and placing the product of such invention on the market." But the rule in its effect was clearly confirmed by the Commissioner in the following terms:

"From the foregoing cases we may extract the principle that an inventor who has completed the

inventive act by reduction of his invention to practice may lose his right to obtain a patent, in favor of a subsequent inventor, by concealment and delay in applying for a patent. An inventor has the power to adopt the secret practice of his invention as his protection instead of the patent monopoly offered by the law to him if he will disclose his invention.

"If he thus refuses to instruct the workers in the art, expecting that secrecy will better serve his private purposes, he may not practice this species of protection indefinitely until it proves insufficient and then avail himself of the protection of that system of patent law which he had tried to replace by other means. By such conduct he has left the field apparently vacant to stimulate the activity of other inventors. After they have relied upon this vacant condition and have by invention supplied the apparent want he cannot defeat them by bringing forward his invention and saying, in effect, that this field is occupied by efforts to the exclusion of their rewards for efforts stimulated by the false appearance created by himself." * * *

"The willful suppression and concealment of the invention on the part of *Matthes* for over three years brings his case within the principle stated, and it is held, therefore, that as against *Burt* he has forfeited his right to a patent."

However much one may doubt the correctness of the view expressed in *Matthes vs. Burt*, which is certainly carrying the doctrine almost to the danger point, the decision in that case fully supports the rule in *Mason vs. Hepburn*, in respect of the two prerequisites that will suffice to defeat the rights of one who actually reduced an invention to practice not in favor of the public as a matter of abandonment, but in favor of his opponent as a matter of priority of invention. These two prerequisites are:

First. That after reducing the invention to practice, it must have been deliberately and intentionally concealed and suppressed, and second, that the filing of the second application must be stimulated by the grant of a patent to his opponent or actual commercial manufacture on the part of the latter. In the present case, we have neither of these features. In the first place, the testimony shows that it was Mr. Edison's intention to file an application for a patent and by the testimony of his attorney he is fully corroborated in this intent. In the second place *Macdonald* has no patent, and Edison was not stimulated to file his application as a result of *Macdonald's* commercial operations, but solely because the machine was secretly discovered by his attorney, and when discovered the application was immediately filed. The doctrine of *Mason vs. Hepburn* is in the nature of a forfeiture, and its harshness should only be invoked in a clear case coming absolutely within its spirit, if not its letter. And, in many cases arising since that decision, the Patent Office and the Court of Appeals have refused to follow the doctrine.

In *Sarfert vs. Meyer*, 1902 C. D., 438, *Sarfert*, after constructing a singing machine in March 1898, waited until March 1900, before applying for his patent. The machine was used, not openly, but under no particular injunctions as to secrecy. The Commissioner said that:

"These facts are not such as will bring *Sarfert's* case within the rule announced in *Mason v. Hepburn*, *supra*. *Sarfert*, after the reduction to practice of his invention, did not deliberately lay 'the same aside, nor did he conceal it from the public.'"

In *Oliver vs. Felbel*, 1902, C. D., 555, *Felbel* reduced to practice on July 20th, 1898, but did not file his application until December 19th, 1899, after *Oliver* had put a large number of machines on the market. The

Court of Appeals refused to follow *Mason vs. Hepburn*, and said:

"There was here no fraudulent concealment, no suppression of the invention to keep it from the public, no abandonment of it as of an unsuccessful experiment, no such unreasonable delay as to impose upon the claimant the burden of proof beyond a reasonable doubt. On the contrary, Felber's delay in this instance does not seem to have been unreasonable under all the circumstances. He had placed his invention in the hands of the person to whom it was most natural for him to look to manufacture it for commercial use, which he was unable to do himself; and he withdrew it from him as soon as it became apparent to him that this person was not then disposed to take up the matter. He had constructed a practical operative machine; the reduction to practice had been complete; and all that remained to be done for the security of his right was to make his application for a patent. Undoubtedly it was possible for him to have done this more promptly than he did; but the delay was not unreasonable.

"The diligence required of an inventor is diligence rather in the reduction of his invention to practice than in application to the Patent Office or in manufacturing his device for public use. It is very true, as we held in *Mason vs. Hepburn*, *Warner vs. Smith*, and other cases, that delay long and unexplained, and yielding to activity only when the knowledge comes of the entrance of a rival on the field, is always presumptive evidence that what is claimed to have been reduction to practice was no more in fact than an unsatisfactory or abandoned experiment. But when reduction to practice has been satisfactorily shown, and there is no unreasonable or unexplained delay, there is no law that would bar the

first or original inventor of his rights. *In order to give to delay the effect of destroying such a right, there must be some circumstance of concealment, suppression or abandonment of the invention.*"

In *McBerty vs. Cook*, 90 O. G., 2295, Cook reduced to practice in 1891 or 1892, but did not file until July 29th, 1896, more than four years afterwards. McBerty on the other hand, had actually reduced to practice in July, 1893, and his original patent was granted August 18, 1895, almost a year before the application of Cook was filed. The Court of Appeals refused to apply the doctrine of *Mason vs. Hepburn* on the ground that the delay of Cook in applying for a patent or in making commercial use of his invention was not such an intention to suppress or conceal his invention from the public as would subordinate his right to that of McBerty, who promptly applied for and obtained a patent.

In *Blood vs. Brown*, 105 O. G., 404, Blood reduced to practice in May, 1899, and Brown in the following month. Brown obtained his patent on February 26th, 1901, and Blood filed his application on April 27th, 1901. Here was present apparently all the circumstances of *Mason vs. Hepburn*, except deliberate or intentional concealment. The Commissioner of Patents, however, refused to follow the doctrine of that case, because the evidence showed that Blood had made unsuccessful efforts to obtain capital, whereby he might file applications for his inventions. So far as the absence of intent to conceal or suppress the invention is concerned, it is as clear in the present case as in *Blood vs. Brown*. Blood made efforts to file an application and Edison believed he had filed an application.

In *Brooks vs. Hillard*, 106 O. G., 1237, Brooks reduced to practice in April, 1902, and filed his original application two years later on April 29th, 1904. Hillard in the meantime, having filed his original application on January 3d, 1893. The present Commissioner held that Brooks' intention to file the patent applica-

tion rebated any presumption of abandonment or concealment and refused to follow *Mason vs. Hepburn*.

Berger vs. Russel, 121 O. G., 2928, is another case where the Court of Appeals refused to follow the doctrine of *Mason vs. Hepburn*. The syllabus reads:

"Where the reduction to practice of the invention was clearly established, a delay of two and a half years in filing the application therefor is not sufficient to destroy the weight of proof of actual reduction to practice, especially where it appears that drawings showing substantially the same construction as the original device were sent to applicant's attorney more than a year before the application was filed and before any one else had entered the field."

In *Rolfe vs. Hoffman*, *supra*, Hoffman's Patent was issued November 17th, 1903. Rolfe filed his application on December 29th, 1903, but reduced to practice in December, 1901. Here was presented a case which at first glance would appear to come within the doctrine of *Mason vs. Hepburn*, because there was a long delay on the part of the junior applicant, after his reduction to practice, and a patent to his opponent had already issued. Yet the Court again refused to apply the doctrine of *Mason vs. Hepburn*, and said:

"There is absolutely nothing in the record in this case to warrant a finding of abandonment by Rolfe. It appears that Rolfe after making these exhibits, submitted them to his patent attorney, with whom they were left to be patented in their turn; that the American Electric Fuse Company had the right to obtain patents for Rolfe's inventions in the art to which the device in controversy relates, and exercised that right subsequent to December 1, 1901, to the extent of filing about twenty applications; that Rolfe talked more or less about this invention with others, and that he

preserved the exhibits. Those facts negative any idea of abandonment of the invention."

Not only do the facts in the present case show, we think beyond any question, that there was no intent or desire on Edison's part to suppress or conceal the invention, which is the first necessary consideration in a case in which the doctrine of *Mason vs. Hepburn* is to be applied, but it does not appear that Edison's application was filed as a result of knowledge of Macdonald's application or of his commercial manufacture. It is stipulated between the parties (M. R., p. 30, 32) that the Macdonald application in this case was involved in a former interference, declared April 29th, 1903, with an application of one Pierman, in which Edison's attorney was also attorney and in which Mr. Edison was interested. Possibly, the argument will be made that this fact was the inciting cause for the Edison application, but no such inference can be drawn under the circumstances, even if it be admitted that the harsh doctrine of *Mason vs. Hepburn* could otherwise be applied. Edison testifies, without qualification, and he is fully corroborated by his attorney, that he had supposed the application was filed, and when it was found that it had not been, the oversight was immediately rectified. This was several months after the Macdonald-Pierman interference was declared. If Edison had deliberately concealed or suppressed his invention, the human thing to have done would have been to file the application when knowledge of the Macdonald application was first obtained, assuming that Edison had personal knowledge of that fact, although no proof as to this point is offered. The fact that Edison did not file the application until the machine was called to his attention by his attorney negatives any possible presumption that the inciting cause was the knowledge of Macdonald's application or commercial work. We submit, therefore, as a result of this review of the authorities, that the present case contains none of the features that would warrant the

application of the doctrine of *Mason vs. Hepburn*. When Edison's invention was reduced to practice in 1893, the application for patent could have been filed, and Edison believed it had been filed. The fact that he was in error as to this point, for which an adequate explanation is made, cannot possibly be taken either as an attempt to abandon the invention or to suppress or conceal it. The Edison invention having once been made, the completeness of the inventive act being conceded and the record failing to disclose any attempt to conceal or suppress the same, then under no authority with which we are familiar can an estoppel arise against Edison, and as a result of which Macdonald can rightfully claim priority of invention.

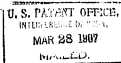
Conclusion.

In conclusion, we submit that Macdonald, although possibly the first to conceive, was not diligent, and in fact has made no attempt to show diligence, in reducing the invention to practice; and that Edison having actually reduced the invention to practice before Macdonald, having had no intent to conceal or suppress the invention, and not having filed his application as a result of the knowledge of Macdonald's application or commercial work, must be regarded as the prior inventor.

Respectfully submitted,

FRANK L. DYES,
For Edison.

Orange, N. J., January 31, 1907.



February 18, 1907.

No. 25,677.

S. C. O.

UNITED STATES PATENT OFFICE.

Edison v. Macdonald.

Phonic Apparatus.

Application of Thomas A. Edison filed September 15, 1905, No. 278,549.

Application of Thomas H. Macdonald filed December 21, 1904, No. 237,857.

Mr. Frank L. Dyer attorney for Edison.

Henars, Mauro, Cameron, Lewis & Harsie attorneys for Macdonald.

The issue of this interference is as follows:

1. In a phonic apparatus, the combination of a phonographic recording surface, means for rotating said surface, a carrier movable across said surface, a phonographic-stylus and friction wheel carried by the carrier, a friction member connected to said stylus and pressing against the friction wheel, and means representative of sound vibrations for varying the friction between said friction member and friction wheel.
2. In a phonic apparatus, the combination of a traveling carriage, a friction wheel and phonographic-stylus carried thereby, a friction member pressing on said wheel and connected to said stylus, means for driving said friction wheel and means representative of sound vibrations for varying the amount of friction between the friction member and friction wheel.
3. In a phonic apparatus, the combination of a rotating mandrel, a carriage movable longitudinally thereof, a phonographic-stylus and friction wheel carried by the carriage, a friction member pressing on said friction wheel and connected to said stylus, and common driving means for moving the carriage and rotating the friction wheel.

4. In a phonic apparatus, the combination of a rotating mandrel, a carriage movable longitudinally thereof, a phonographic stylus and friction wheel carried by the carriage, a friction member pressing on said friction wheel and connected to said stylus, common driving means for moving the carriage and rotating the friction wheel, and means representative of sound vibrations for varying the friction between the friction member and friction wheel.

The invention which forms the subject-matter of the issue is employed by the respective parties in structures which are specifically different. That described by Edison is a recording telephone, that by Macdonald a loud-speaking phonograph. Each of the two devices, however, involves an amplifying means or means for increasing the effect of the apparatus. As used by Edison, this element is intended to amplify the mechanical effect of a telephone receiving diaphragm so that the vibrations thereof may be successfully recorded on a phonographic cylinder. Macdonald employs a somewhat similar amplifying device to magnify the effect of the reproducing stylus of a phonograph on its diaphragm so as to cause the same to act with greater force and intensity.

The amplifier of Edison is an older invention of his which has become known as a chalk telephone or motograph. It consists essentially of a constantly rotating friction wheel of chalk or similar material moistened with a conducting solution, and a friction member consisting of a flat spring pressing against the chalk and connected to a diaphragm. The constant rotation of the chalk draws on the spring, and this in turn strains the diaphragm. The line current is conducted through the chalk roller and friction spring. As the current flows therein the friction is reduced, the amount of this reduction varying with the strength of the current. As the current varies with the undulations produced by the transmitting instrument, the strain on the friction spring varies likewise, and this permits the diaphragm to yield and vibrate in accordance with the variations in current.

The amplifying device employed by Macdonald consists of a constantly rotating friction member, a friction band arranged around the same, one end of the latter being attached to the diaphragm of the phonograph and the other end to the reproducing stylus. As the friction device is rotated it tends to strain the diaphragm, and as the stylus passes in and out of the indentations of the record, it varies the strain on the friction band, thereby varying the pull on the diaphragm. The effect of this is to increase or amplify the vibrations of the diaphragm, compared with what they otherwise would do.

The allegations of the parties as set forth in their respective preliminary statements are as follows:

Edison:		Macdonald:	
Conception	April, 1902;	:	December, 1900.
Disclosure	" "	:	" "
Drawings	" "	:	None.
Model	None;	:	"
Reduction to practice . .	June, 1902;	:	August, 1901.

It is argued by Edison that Macdonald cannot make count 1 of the issue, because he does not disclose a recording surface, but has described a machine which is only capable of reproducing a previously made record. An examination of the record of this interference shows that Edison failed to make any motion to disavow on the ground that Macdonald had no right to make this claim, and he is therefore in no position to urge this question at the present time. Moreover, an examination of Macdonald's application shows that he states that his machine is adapted both for recording and reproducing sounds.

Macdonald's application was filed December 21, 1904; that of Edison, on September 15, 1905. The burden of proof is therefore

upon Edison.

Edison alleges conception of the invention in 1902. He afterward made sketches of the device and had a machine constructed, which latter is in evidence as "Edison Exhibit Recording Telephone". The record clearly shows that this was completed in the summer of the same year. This is the machine depended upon by Edison to prove reduction to practice of his invention. It is urged, however, by Macdonald that the evidence shows that the machine was never tested to see whether or not it would perform the functions for which it was designed, and that therefore it can serve him no other purpose than as evidence of conception.

From Edison's own testimony it is clear that the machine was only tested to see whether it would work mechanically; that is, to ascertain whether the chalk disk could be kept in rotation by the mechanism designed for that purpose. Edison says (qs. 39 and 40) that it was simply tested to see whether the mechanism was right, and that it was run backward and forward for this purpose. There is no evidence to show that it was ever tested to see whether it would record speech. In fact it is admitted by Edison that it never was so tested. He contends, however, that no such test was necessary. He states that both the chalk receiver and the phonograph were old and well known instruments and obviously operative. He therefore argues that it was unnecessary to test the machine to ascertain whether the combination of these elements would operate in the manner intended.

Edison's view of the case cannot be regarded as correct. Such apparatus does not belong to that class of simple inventions which require no test to demonstrate their operativeness. As stated by the Court of Appeals of the District of Columbia in the case

of *Macdonald v. Edison*, 105 O.G., 1263, it is necessary for an inventor to prove that his machine as constructed was capable of successfully performing the work for which it was intended. Inasmuch as Edison failed to make this test, his machine cannot be regarded as a reduction to practice and can only serve him as evidence of conception.

After this machine was built in 1902, nothing further was done by Edison until the filing of his application on September 15, 1905. In excuse for this delay, Edison testifies that he thought an application had been filed, as he had given direction that the same be prepared. Edison therefore is entitled to conception of the invention in the year 1902 and to reduction to practice on September 15, 1905, the date on which he filed his application.

The record shows that the amplifying device employed by Macdonald was not of this party's invention. It was originally devised by Daniel Higham. Macdonald testifies that in December, 1900, Higham disclosed to him the essential principle of his friction amplifying device. The machine to which Higham had applied his invention had a fixed reproducer, and this construction necessitated the mandrel being fed along beneath the same. Macdonald did not regard this as a practical construction and the idea occurred to him of mounting the friction device so as to move in conjunction with the reproducing mechanism of the regular phonograph. He had the idea embodied in a machine which was completed in the spring of 1901. He fixes the date as being prior to a strike of the machinists in his employ which occurred about this time. He remembers that the machine was made before the strike. This machine was full size and complete in every particular, and was used during the years 1901 and 1902 as an exhibition device. The machine is in evidence as "Macdonald Exhibit 1, 1901 Machine", and is now in working condition.

As to the building of this machine, Macdonald is fully corroborated by Frank H. Osborne, who testifies that he saw the machine in the early part of 1901; that it operated successfully at that time, and that it is now in the condition it then was. He is further corroborated by E. H. Byrnes, foreman of the laboratory of the American Graphophone Company, who stated that he saw the exhibit when it was in course of manufacture and saw it operated after it was completed.

From this evidence it is clear that Macdonald has proved conception of the invention at least as early as the time this machine was completed. This being long prior to the date alleged by Edison in his preliminary statement as the date of his conception, it must be held that Macdonald was the first to conceive the invention.

It is urged on behalf of Macdonald that the 1901 machine constituted a reduction to practice of the invention. An examination of the testimony, however, fails to make it clear that Macdonald regarded the machine as a complete and perfected device. It is true he testifies that it was used to demonstrate the practicability of his ideas, but he also testifies that the friction device was of such a character that he did not at that time succeed in producing a machine which he considered commercial, and that "the devices were set aside as an uncompleted experiment" (X-Q. 44). It was only after Higham in 1904 produced a greatly improved friction device that Macdonald saw the practicability of the invention and again took up the same with the intention of promoting it commercially. In view of this testimony by Macdonald himself, it is obvious that his 1901 machine can only be regarded as an experimental device.

After Higham had perfected his construction Macdonald again took up the matter, had drawings for a commercial machine made in-

November, 1904, and placed the device upon the market in December of the same year. The exact time when these latter machines were completed is not given, but the time appears to have been practically concurrent with the filing of his application, which took place on December 21, 1904.

Macdonald having proved himself to be the first to conceive the invention and the first to reduce the invention to practice, at least constructively by filing his application, must be regarded as the prior inventor.

Judgment of priority of invention is awarded to Thomas H. Macdonald, the senior party.

Limit of appeal will expire April 17, 1907.

C. C. Billings,
Examiner of Interferences.

March 28, 1907.

**LEGAL DEPARTMENT RECORDS
PHONOGRAPH - CASE FILES**

This material consists of correspondence, court documents, and other items relating to infringement suits, contract disputes, and other legal actions involving Edison's phonograph. Most of the selected items cover the years 1899-1910, but a few case files begin during the mid-1890s and some continue into the 1910s. Approximately half of the cases relate to litigation involving the National Phonograph Co. or other Edison interests and the American Graphophone Co. or its associated sales company, the Columbia Phonograph Co., General. Other cases deal with the disposition of litigation between Edison and the New York Phonograph Co.; the supply of Edison phonographs to Europe; patent infringement by Pathé Frères in France; and Mexican copyright law. In addition, there is a case file containing information concerning price maintenance litigation pursued by the National Phonograph Co. and its affiliates. Closely related cases have been grouped in the same folders.

***American Graphophone Company v. National Phonograph Company*
(Macdonald Patents 606,725 and 626,709)**

This folder contains material pertaining to two suits brought by the American Graphophone Co. against the National Phonograph Co. in the U.S. Circuit Court for the District of New Jersey. The cases were initiated in March 1906, and each involved one of Thomas H. Macdonald's patents on the composition of wax cylinders. The selected items consist primarily of letters to and from Adolph Melzer, who conducted experiments on wax cylinders for Macdonald during the 1890s. Also included is a 1906 memorandum by Frank L. Dyer informing Edison about the progress of the litigation, along with letters relating to the eventual settlement of the cases in June 1908.

***American Graphophone Company v. National Phonograph Company and
Blackman Talking Machine Company***

This folder contains material pertaining to the suit brought by the American Graphophone Co. against the National Phonograph Co. and one of its agents, the Blackman Talking Machine Co., in the U.S. Circuit Court for the Southern District of New York. The case was initiated in June 1909 and involved Richard B. Smith's U.S. Patent 891,831 on a reproducer swivel arm. The selected documents consist of affidavits by Edison, William Pelzer, and Peter Weber, along with three blueprints accompanying Edison's affidavit. Also included is an undated item, probably written by Frank L. Dyer, comparing Smith's patent with reproducer patents issued to Edison and John G. English.

American Graphophone Company v. Cleveland Walcutt et al.

This folder contains material pertaining to one of several suits brought by the American Graphophone Co. against Cleveland Walcutt and his associates in the U.S. Circuit Court for the Southern District of New York. The case was initiated in 1894 and involved U.S. Patents 341,214, 341,288, and 341,287 issued to Chichester A. Bell and Charles S. Tainter. Similar cases were initiated in 1897 and 1898. The selected items consist of the index and affidavits by Edison, George E. Tewksbury, and Cleveland Walcutt from a volume entitled *Defendants' Papers in Opposition to Motion for Preliminary Injunction*.

***Columbia Phonograph Company v.
National Phonograph Company and William J. Rahley***

***Columbia Phonograph Company v.
John E. Whitson and Walter J. Whitson and the National Phonograph Company***

This folder contains material pertaining to two suits brought by the Columbia Phonograph Co. against the National Phonograph Co. and two of its agents, William J. Rahley of Baltimore and Whitson Brothers of Washington, D.C. The Rahley case was heard in the U.S. Circuit Court for the District of Maryland; the Whitson case, in the Supreme Court of the District of Columbia. Both cases were initiated in April 1901 and involved territorial sales rights. The selected items include the bill of complaint and a summary of docket entries for the Rahley case, along with correspondence regarding the progress of litigation in both suits.

Thomas A. Edison v. Frederic M. Prescott

This folder contains material pertaining to the suit brought by Edison against Frederic M. Prescott in the New Jersey Court of Chancery. The case was initiated in June 1889 and involved Prescott's misrepresentation of himself as Edison's agent. It was a companion suit to *Edison Phonograph Company v. Frederic M. Prescott*, which involved infringement of Edison's U.S. Patents 386,974 and 393,466. The selected items include Edison's bill of complaint; Prescott's answer, which bears Edison's marginalia; an affidavit by Edison; and correspondence regarding the suit.

Thomas A. Edison et al. v. New York Phonograph Company et al.

New York Phonograph Company v. Siegel-Cooper Company

This folder contains material pertaining to the suit brought by Edison, the National Phonograph Co., the Edison Phonograph Works, the Edison Phonograph Co., and Frank L. Dyer against the New York Phonograph Co., James L. Andem, and others in the New York Supreme Court for the County of Westchester. The case was initiated in December 1909 and involved a dispute over the settlement reached in *New York Phonograph Company v. National Phonograph Company et al.*, executed on April 9, 1909. The selected items consist of the bill of complaint and the two contracts of settlement in dispute. Also included is Frank L. Dyer's deposition in another case, *New York Phonograph Company v. Siegel-Cooper Company*, initiated in April 1909 in the New York Supreme Court for the County of Westchester, which discusses the protracted litigation between the New York Phonograph Co. interests and the Edison interests.

Thomas A. Edison, Inc. v. United States Phonograph Company

This folder contains material pertaining to the suit brought by Thomas A. Edison, Inc., against the United States Phonograph Co. in the U.S. Circuit Court for the Southern District of New York. The case was initiated in June 1911 and involved Edison's U.S. Patent 984,221 on a 200-thread record. The selected items consist of the bill of complaint, along with testimony by Walter H. Miller and George B. Redfearn regarding early technical and commercial experimentation with 200-thread records. Miller's and Redfearn's testimonies were entered into evidence in two companion suits against the United States Phonograph Co., which involved Edison's reissued patent on a button-ball stylus (U.S. Patent Reissue 11,857) and Peter Weber's reissued patent (U.S. Patent Reissue 13,120) on a four-minute stylus.

Edison Phonograph Works v. Edison United Phonograph Company

Edison United Phonograph Company v. Edison Phonograph Works

This folder contains material pertaining to the suit and countersuit brought by the Edison Phonograph Works and the Edison United Phonograph Co. in the New Jersey Court of Chancery. The cases were initiated in 1901 and involved the solvency and holdings of the Edison United Phonograph Co. and the contractual relations between the two companies. The selected items include the bill of complaint by the Edison Phonograph Works; a 12-page draft in Edison's hand and other correspondence regarding the suit; and the bill of complaint and defendant's affidavit in the countersuit.

Edison United Phonograph Company v. Thomas A. Edison et al.

This folder contains material pertaining to the suit brought by the Edison United Phonograph Co. against Edison, trading under the name of Edison Manufacturing Co., and the Edison Phonograph Works in the New Jersey Court of Chancery. The case was initiated in May 1895 and involved a dispute over foreign sales rights for phonographs. The item at issue was Edison's "kineto-phonograph"—a phonograph attached to a peephole kinetoscope. The selected documents consist of the bill of complaint, an affidavit by Theodore Seligman for the complainant, and affidavits by Edison and Henry Morton for the defense.

José Elizondo et al. v. Jorge Alcalde

This folder contains material pertaining to the suit brought by José F. Elizondo, Luis G. Jorda, and Rafael Medina against Jorge A. Alcalde in Mexico. The case was initiated in 1906 and involved alleged copyright violations by Alcalde, an agent of the Mexican National Phonograph Co. The selected items consist of letters concerning the case, along with correspondence between attorneys representing the National Phonograph Co., the Victor Talking Machine Co. and the Columbia Phonograph Co. regarding musical copyright in Mexico. Also selected is a copy of the court decision in a related case involving Elizondo and S. V. Schmill, an agent of the Victor Talking Machine Co. in Mexico.

International Graphophone Company v. Thomas A. Edison et al.

This folder contains material pertaining to the suit brought by the International Graphophone Co. against Edison, John F. Randolph, William E. Glimore, the National Phonograph Co., the Edison Phonograph Works, and the Edison Manufacturing Co. in the New Jersey Court of Chancery. The case was initiated in January 1905 and involved the contractual and financial responsibilities of the Edison Phonograph Works, in which the International Graphophone Co. possessed stock. The selected items consist of the bill of complaint, Edison's answer, and a letter by Frank L. Dyer regarding the progress of litigation.

George Croyden Marks v. Pathé Frères

This folder contains material pertaining to the suit brought in France by George Croyden Marks against Pathé Frères (Compagnie Générale des Phonographes, Cinématographes et Appareils de Précision). The case was initiated in 1904 and involved the patents of Fernand Desbrière on molded records. It was a companion suit to *Compagnie Française du Phonographe Edison v. Pathé Frères*. The selected items consist of correspondence from the period 1908-1910 concerning attempts to settle the litigation.

National Phonograph Company v. American Graphophone Company
(Miller and Aylsworth Patent 683,615)

National Phonograph Company v. American Graphophone Company
(Miller and Aylsworth Patent 683,676)

New Jersey Patent Company v. American Graphophone Company
(Joyce Patent 831,668)

This folder contains material pertaining to three suits brought against the American Graphophone Co. in the U.S. Circuit Court for the Southern District of West Virginia. The first two suits were initiated by the National Phonograph Co. in June 1905; the third by the New Jersey Patent Co. in November 1906. The cases involved three patents on methods of duplicating phonograph records—Walter H. Miller's and Jonas W. Aylsworth's U.S. Patents 683,615 and 683,676 and Maurice Joyce's U.S. Patent 831,668. The cases were consolidated by stipulation in January 1908 and dismissed with costs to the defendant in December 1910. The selected documents include correspondence by Frank L. Dyer and Herbert H. Dyke of the Legal Department and Philip Mauro and C. A. L. Massie, attorneys for the defendant, pertaining to the progress of litigation. Also included are the following items from the printed record of the consolidated case: index; complainant's brief in support of a motion to suppress the deposition of Mauro; defendant's brief in opposition to the motion; defendant's proofs; and complainant's rebuttal proofs.

National Phonograph Company v. American Graphophone Company and Columbia Phonograph Company, General
(Edison Patent 454,941)

National Phonograph Company v. American Graphophone Company and Columbia Phonograph Company, General
(proposed suit)

National Phonograph Company v. American Graphophone Company and Columbia Phonograph Company, General
(Edison Patents 397,280 and 430,278)

This folder contains material pertaining to three suits brought or considered by the National Phonograph Co. against the American Graphophone Co. and its sales company, the Columbia Phonograph Co., General. The first case was initiated during January 1903 in the U.S. Circuit Court for the Southern District of New York and involved Edison U.S. Patent 454,941 on a built-up diaphragm. The selected items consist of correspondence and memoranda pertaining to Edison's deposition in the case. The second suit was considered by Edison and his attorneys during August 1904 and involved charges of unfair competition. The selected items consist of correspondence and the proposed bill of complaint. The third case was initiated during October 1904 in the U.S. Circuit Court for the District of Connecticut and involved Edison's U.S. Patents 397,280 and 430,278 on a floating-weight reproducer. The selected items consist of the bill of complaint and Edison's affidavit.

National Phonograph Company v. Lambert Company

This folder contains material pertaining to the suit brought by the National Phonograph Co. against the Lambert Co. in the U.S. Circuit Court for the Northern District of Illinois. The case was initiated in December 1902 and involved Edison's U.S. Patent 713,209 on molding records. The selected items consist of correspondence regarding the progress of litigation; a report by Walter H. Miller on a visit to the Lambert factory in Chicago; and portions of the National Phonograph Co.'s brief on appeal to the U.S. Circuit Court of Appeals.

National Phonograph Company v. Lambert Company and Thomas B. Lambert
(Edison Patent 414,761)

Edison Phonograph Company v. Lambert Company and Thomas B. Lambert
(Edison Patents 382,418 and 382,462)

This folder contains material pertaining to two suits brought by the National Phonograph Co. and the Edison Phonograph Co. against the Lambert Co. and Thomas B. Lambert in the U.S. Circuit Court for the Northern District of Illinois, Northern Division. The cases were both initiated in December 1900 and involved Edison's U.S. Patents 414,761, 382,418, and 382,462 on phonograph record blanks. Together, these cases were also known as the "tapered bore case." The selected items consist of the following portions of the complainant's printed record: index, bills of complaint, and testimony of Edison.

New Jersey Patent Company v. Columbia Phonograph Company, General

This folder contains material pertaining to the suit brought by the Edison interests against the Columbia Phonograph Co., General, in the U.S. Circuit Court for the District of New Jersey. The case was initiated in April 1905 and involved Jonas W. Aylsworth's U.S. Patent 782,375 on record blank composition. The case, also known as the "carmauba wax case," was settled in June 1908, along with the *American Graphophone Company v. National Phonograph Company* cases ("Macdonald composition cases") heard in the same court. The selected items consist of the following portions of the printed record: index, bill of complaint, and testimonies of Edison and Aylsworth.

New York Phonograph Company v. National Phonograph Company et al.

This folder contains material pertaining to the suit brought by the New York Phonograph Co. against the National Phonograph Co., Edison, the Edison Phonograph Co., and the Edison Phonograph Works in the U.S. Circuit Court for the Southern District of New York. The case was initiated in January 1901 and involved territorial sales rights. The selected items consist of correspondence from the period 1900-1905 regarding the context and progress of the litigation.

United States of America v. James L. Andem

This folder contains material pertaining to the criminal suit brought against James L. Andem in the U.S. District Court for the District of New Jersey. The case involved Andem's alleged forgery in representing himself as the secretary of the New England Phonograph Co. in May 1905. He was found not guilty in May 1908. The selected items consist of letters and other documents from 1907 and 1908 concerning the context and progress of the litigation.

***United States of America on the Relation of National Phonograph Company v.
Frederick I. Allen, Commissioner of Patents***

This folder contains material pertaining to public use proceedings and subsequent litigation brought by the National Phonograph Co. in the U.S. Patent Office, Supreme Court of the District of Columbia, and Court of Appeals of the District of Columbia. The proceedings were initiated in May 1899 and involved Edison's attempt to block applications by Leon F. Douglass and Thomas H. Macdonald for patents on a larger-diameter record with a high surface speed. The selected items consist of the following portions of the printed record on appeal: index, petition for mandamus, petition for public use proceedings, and affidavits of Edison and William E. Gilmore.

Price Maintenance Cases

This folder contains a volume entitled *Litigation in Enforcement of System Under Which Edison Phonographs and Records Are Sold*, published by Thomas A. Edison, Inc., in April 1911. Included are printed copies of injunctions and decrees arising from price maintenance suits brought against sales agents of the National Phonograph Co. and other parties engaged in cutting prices of Edison products. Only the index, introduction, and six lists of cases have been selected.

**Legal Department Records
Phonograph - Case Files**

***American Graphophone Company v. National Phonograph Company*
(Macdonald Patents 606,725 and 626,709)**

This folder contains material pertaining to two suits brought by the American Graphophone Co. against the National Phonograph Co. in the U.S. Circuit Court for the District of New Jersey. The cases were initiated in March 1905, and each involved one of Thomas H. Macdonald's patents on the composition of wax cylinders. The selected items consist primarily of letters to and from Adolph Melzer, who conducted experiments on wax cylinders for Macdonald during the 1890s. Also included is a 1906 memorandum by Frank L. Dyer informing Edison about the progress of the litigation, along with letters relating to the eventual settlement of the cases in June 1908. Portions of the court record for these two cases appear in *Thomas A. Edison Papers: A Selective Microfilm Edition, Part III*, 116:478-117:269.

May 22, 1905.

A. Melzer, Esq.,
Evansville, Indiana

My dear Sir:-

We have had some correspondence in the past relating to phonograph matters, and I also have pleasant recollections of my interview with you. I would like to count on your friendly assistance in a matter which I think should be thoroughly ventilated and exposed. As you know, phonograph cylinders and blanks are formed essentially of stearate of soda, stearate of aluminum and ceresin, the mixing being carried at a high temperature - about 450 degrees F., and the aluminum being added in metallic form to the caustic solution before the addition of the latter to the stearic acid. These cylinders and blanks have been made and sold continuously by me since prior to the year 1890. In the early days, the Graphophone Company either made use of a stearate of lead composition, or else bought old Edison blanks, melted them up and re-molded them. They were very anxious to get hold of my formula, and I understand, hired some of my men away for this purpose. In November, 1896, Mr. Macdonald filed

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A. Melzer, Esq. - 2.

an application on my formula, but he did not describe the use of a high temperature, which he was probably unfamiliar with. This patent was granted July 5th, 1898, numbered 606,725. On August 23^d 1898, Macdonald filed a second application, describing the use of a high temperature, and also, mentioning my formula, and this patent was granted June 13th, 1899, numbered 626,709. In other words, Macdonald obtained two patents, describing the wax composition which I had been publicly using continuously for more than nine years. I did not know of the existence of these patents until several years after their issue.

It seems almost inconceivable, but notwithstanding this situation, the Graphophone Company have sued my concern for infringing these patents. I understood from my talk with you that you were more or less familiar with this situation, and that, in fact, the Graphophone Company had requested you to analyze my composition, and advise them as to the way to make it. I would like, therefore, to have you testify in my behalf, in order that the truth may be disclosed. This testimony could be taken at Evansville, so as not to seriously inconvenience you. First of all, however, I would like to have my attorney meet you and talk over the situation. He can go to Evansville at any convenient date, but I would like to have the matter attended to promptly. If you will wire me on receipt of this, and advise me whether I can count on your assistance, I will be very much obliged.

Yours very truly,

MELZER BROS., SUCCESSORS TO

ADOLPH MELZER
CHARLES MELZER

HIGHEST AWARDS WORLD EXHIBITION
PHOTOGRAPHY, CYCLOSTYL
FOR DECORATED AND TRANSPARENT SOAPS.



Thos. A. Edison Esq.
Orange N.J.

Evansville Ind. May 27th 1905
Dyr Mr Edison - wrote him nice
letter - will send him to put holes
in it him to put holes

My dear Sir

Your favor of 22nd I wish to hand, and
have wired you: Your letter to hand. Will write fully tonight.

Will now relate as fully and correctly, my connection
with the phonograph cylinder composition business as I
can without reference to all the records and papers on
the subject. This may be all you will require, however,
any further information, or testimony before notary or
your attorney, I will give cheerfully.

I have felt all along that you are being wronged by
Macdonald, and in a measure feel that, I too, have done
wrong in working out a suitable composition for
phonograph cylinders for the Acrophonograph, but assure you
this was not done from motives of gain or to injure you,
but because of the fascination the phonograph has had
tome from the time I heard the first record played
by a slot machine at the Eden Musee on my return
from a European trip in 1891, and when the opportunity
offered to work out a soap for phonograph cylinders,

MELZER BROS., SUCCESSORS TO

ADOLPH MELZER
CHARLES MELZER
HIGHEST AWARDS WORLD'S COLUMBIAN
EXPOSITION, CHICAGO 1893
FOR DECORATED AND TRANSPARENT SOAPS.



Evansville Ind.
a soap that would talk and sing, I wanted to make
that soap.

It was on the occasion of a visit to Chicago in August
1894 that I called on the publisher of American Soap Journal,
Dr. H. Gathmann, with whom I am intimately acquainted.
In the course of our conversation, Mr. Gathmann read to
me several letters on peculiar subjects, asking me
what he should do with them. Among these letters was one
from Mr. Macdonald as follows:

"We have been kindly referred to you by the Enos J.
Jones Chemical Co. of N.Y. We desire to obtain the
services of a competent man who is thoroughly informed
in the principles of hard soap making. Our work is not
soap making, in the ordinary sense, but still the
material we use is a true soap made from Stearines.
We use it for making records upon the Graphophone
and Phonograph. We desire a man who is capable of
carrying on a certain amount of experimental work
intelligently. One who is thoroughly posted in all
the details of the manipulations of soap materials.
Can you suggest any material that will be likely

3, MELZER BROS.. SUCCESSORS TO



Cincinnati, Ind.

to prevent when mixed with soap material, the discoloration or cloudy appearance on the hard clear surface of such soap?

The mixture I use is made from Stearic, Caustic Soda, ozokerite, and acetate of lead. I mix the Stearic and ozokerite, 8 of Stearic and one of ozokerite, then add about one eighth the weight of Caustic Soda. After this has boiled for 24 to 30 hours I add about 10% of acetate of lead or common litharge. The mixture is an exceedingly hard brown mixture. I mail you in a separate box a number of samples. Now, our chief difficulty arises after some days. The mixture is rounded into cylinders and shaved off smoothly, but after standing for a time it will become covered with a cloudy mould which will always reappear even after repeated brushings. If you could suggest anything that will cure this we will be greatly obliged."

I expressed to Mr. Rathmann my intention of taking up this matter and took Mr. McDonald's address. Then, in next issue (Sept 1894) of American Soap Journal, appeared this ad.

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ADOLPH MELZER
CHARLES MELZER
HIGHEST AWARDS WORLD'S COLUMBIAN
EXPOSITION CHICAGO 1893
FOR DECORATED AND TRAMPMENT SOAPS.



Evansville Ind.

Wanted — Thoroughly practical man capable of carrying on experimental work in hard soap making. Work is on a metallic, insoluble soap not used for washing purposes. One versed in the working of stearine trades and lead soaps greatly to be preferred. Address: J. H. Macdonald, Manager, Bridgeport, Conn.

Under date of Sept 1st 1894 I wrote to Mr Macdonald proposing to undertake the experiments, whereupon he replied asking for terms, time it would require, and where the experiments would be made. I answered, the experiments would have to be made here, time uncertain, expense nothing, if we (myself and brother) failed, and if successful, he could give us what he believed right and fair for the time and labor expended. This was satisfactory to Macdonald and we next requested him to give us full particulars as to the properties he wished this new soap to possess, together with all data that might assist us in starting and prosecuting the work. (Please consider that, up to that time we had not seen a phonograph cylinder, except in a slot machine, and did not have the remotest idea how a record is made, believing it is indented, and hence that the cylinder should be soft, something like ordinary soap.)

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A. MELZER

FINE

Toller Soaps

ADOLPH MELZER
CHARLES MELZER
HIGHEST PRIZES WORLD'S EQUIPMENT
EXPOSITION, CHICAGO, 1893.
FOR OCCUPYING THE TRANSPARENT SOAP.

Counsville Ind.

The following is copy of Mr. Macdonald's reply.

Bridgport, Conn. Sept. 19th 1894

A. Melzer

Counsville Ind.

Dear Sir,

Your favor of recent date received.

We think your proposition a fair one, and will be glad to have you go ahead on the experimental work.

We ship you today by Adams Express a box containing samples of all the mixtures we have used, also samples of the raw materials. With each sample I have attached a memorandum stating how the mixture was made.

There are several essential requisites in the soap for our use. First of all it must admit of a good record. To this end it is necessary that it be a hard, homogeneous, close grained mixture. There must be no tendency to gumminess or stickiness. If there is, the recording tool will at once be clogged up and the record be seriously affected.

The mixture, after the record is placed upon it, must not mould, effloresce, or change character in any way. If it does, the fine and delicate record placed upon its surface will be destroyed. This has been our greatest trouble.

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Evansville Ind.

The mixture must be of such character that it will remove easily. To this end it is necessary that it pass from the melted, liquid state, to a jelly-like consistency, and thus harden slowly. This admits of easy removal from the mould.

I have found the best mixture to be as follows:
Shearine 34 lbs, Caustic Soda 40 lbs. Acetate Lead 40 lbs.
Ozokerite 3 lbs.

I mix the melted Shearine and Ozokerite wax, and keep them at a temperature of about 300° F. for 2 hours. Then slowly add the Caustic Soda. When this has thoroughly united, and all ebullition has ceased, I add the Acetate of Lead. The mixture will then congeal at a temperature of about 300° F. This I keep just above this point for four or five hours, and then unmoulded. Possibly, as you suggest, Shearic Acid would be better than the ordinary Commercial Shearines.

Our mixture is in fact a saponified Shearic Acid of Lead with the addition of a little Ozokerite or Ceresin, (which is refined Ozokerite)

We have not used water in the making and possibly therein have made an error.

The Shearine we have used has been purchased in bulk from A. C. Bidwell & Co. of New York.

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ADOLPH MELZER
CHARLES MELZER
HIGHEST AWARDS WORLD'S COLUMBIAN
EXPOSITION CHICAGO 1893
FOR DECORATED AND TRUMPET SOAP.



Evansville Ind.
Hoping that you will soon be able to see your way to
some solution of our difficulties, we remain
Yours truly
American Graphophone Co.
By J. H. Macdonald

With this as a guide, I started in, and here I worked, and
what did I try? (I now use the singular "I," for my
brother took little stock in phonograph soap and caught at my
(lolly) Outside Stearic, I used every fat acid known in
the arts, and many that are not procurable, I made
for the purpose; I tried every known wax and gum, and
all the metals or their oxides or salts, and obtained best
results from Composition composed of
100 lbs. Stearic Acid
15 " Ceresin or Paraffin wax (of highest purity)
7 1/2 " Caustic Soda in form of 35°-40° Solution
1 1/2 " Hydrate or Hydroxide Aluminum
(dissolved in the Caustic Soda Solution)

Have used equivalent of Carb. Soda for the Caustic Soda, and
eg. Metallic Aluminum for the Hydrate, but found no difference
in the results.

In Dec 1894 I sent to Mr. Macdonald sample of Composition
practically as for above, which he pronounced in every
way satisfactory and wished us to name compensation
for the formulae. I replied that \$500. - for the 3 months' single
& day work, including cost of materials, expenses, gas
and the broken thermometers and laboratory apparatus, graciously

8, MELZER BROS., SUCCESSORS TO



ADOLPH MELZER
CHARLES MELZER
HERBERT MARSH WORLD COLUMBIAN
EXPOSITION, CHICAGO, 1893
FOR RECEPTS AND TRANSMITTAL SOAPS.

Evansville, Ind.
would be about right, but he thought this too high, and rather than accept less money, I wrote him to send me a graphophone and call it square. This he did, and on Dec 31st 1894, I sent him the formula written out in a book, together with instructions covering every contingency I could think of, tables &c.

It seems, nevertheless, that Mr. Macdonald experienced trouble in making cylinders, and asked privilege to come to our factory for personal instruction, which was cheerfully granted; he came here some time in Feb'y 1895, bringing with him, a couple cylinder records, a reamer and a little foot lathe for turning off the rounded cylinders, and soon for the first time, I learn how cylinders are rounded and how the record is made, which I ought to have known in the beginning. Mr. Macdonald was with us about 2 weeks, during which time we made cylinder compositions, rounded with into cylinders and made records, which altogether, was to me the most interesting work I had ever done. Then I wish to say that we rounded the cylinders at a temperature of min. 145° C. for the very white cylinders to 170-180° C. for the colored ones.

After Mr. Macdonald's return to Bridgeport, he still did not seem to be satisfied, his cylinders had "pin holes"

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Evansville, Ind.

he got better results, when he used dry caustic soda in place of the lye or NaOH . This was very discouraging to me, and I wrote him that I would come to Bridgeport and make his cylinders for a week or two, if he would pay my travelling expenses, and at same time, I prevailed upon my brother, Chas. Melzer, to make an analysis of a broken cylinder, supposed to be one of yours, but in the absence of positive proof, it was entered as Cylinder X. Laboratory record shows analysis was begun on July 28th 90 and a second analysis was made on Mar. 19th 91. The figures and memorandum of these analyses cover many pages, and the findings disclosed presence of a rather large percent Al_2O_3 .

Mr. Macdonald agreed to pay my travelling expenses to Bridgeport, I went there, made cylinders for him, and broke in his furnace. Loss from imperfect cylinders during my stay was very small; the trouble was of a mechanical nature.

I infer from your letter that, you consider a high temperature as being very essential in making cylinders. By referring to Macdonald's patent 626,709, I find he gives as reason for the high temperature, the driving off of all water of crystallization and destruction of all

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ADOLPH MELZER
CHARLES MELZER

HIGHEST AWARDS WORLD'S COLUMBIAN
EXPOSITION, CHICAGO, 1893
FOR ECONOMY AND TRANSPARENT SOAPS.



Evansville, Ind.

fibrous matter and other organic impurities in the composition. It is my opinion that, the "rate of crystallization" or any other kind of H_2O does not require a temperature of $450-475^\circ F.$ for its expulsion, and if the temperature is raised high enough to "destroy all fibrous and other organic impurities, it will also destroy organic matter that should not be destroyed, i.e. the stearic acid. The high temperature may be beneficial in volatilizing light hydrocarbons in the ceresin or paraffin wax, and glycerin, and to some extent, oleic acid in the stearic acid, but it would be better to get rid of these objectionable elements by other means than volatilization and carbonization by means of a high temperature.

I presume you are conversant with Mr. Aylsworth's patent. I cannot discover any novelty or improvement

Believing this covers the case pretty thoroughly, I beg to remain

Very Respectfully
A. Melzer

MELZER BROS., SUCCESSORS TO

ADOLPH MELZER
CHARLES MELZER

HIGHEST AWARDS WORLD'S COLLEGIUM
GOLDEN MEDALS
FOR DEODORIZED AND TRANSPARENT SOAPS.



Thos. A. Edison Esq.
Orange N.J.

Evansville Ind. June 1st 1900

My dear sir

Your favor of 29th ult. to hand and
carefully noted. Think I have all of Macdonald's
letters, and also copies of mine, except that of Sept 4/94,
which probably I did not copy, because it seemed of no
importance, being merely my offer to undertake the
experimental work he wished done. It is from his
answer, dated Sept 11/94, beginning, "Pardon my delay
in answering your esteemed favor of Sept 1st," that
I obtained the date of my first letter to Macdonald.
After that, think I copied all letters up to Dec 24th/95;
after that, it appears I copied no more of the letters
I wrote to Macdonald, although we exchanged
letters occasionally for several years afterwards.
I have also a copy of Sept. 1894 Soap Journal,
and have no doubt, Dr. Baumann will remember the
conversation in Aug/94. Will write to him today.

Permit me to remark that, metallic aluminum dissolves readily in caustic soda solution, liberating hydrogen, and resulting aluminates is same as when the hydrate (soluble form of oxide) of aluminum is employed. However, the hydrate is so very much cheaper than the metal, that it is rank extravagance to use the latter. You are no doubt correct in that the commercial hydrate is contaminated with silica (and also insoluble oxide^{tho}) but in using it, it is dissolved in the lye at a temperature barely reaching the boiling point, and solution is filtered cold through paper, and permitted for weeks to precipitate any impurities it may nevertheless contain; hence there can be no grittiness from this source. I obtained my hydrate of Aluminum from Penna Salt Co, and Solvay Process Co and also made it from alum and Sulph. Aluminum. The resulting cylinders, compared with those for which metallic aluminum had been employed, showed no difference in quality.

Since my last letter, I have looked through Macdonald's letters, and find he did write me under date of Sept 3/96 that he had recently learned that, the phonograph cylinders are made of Stearic acid,

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Caustic Soda, Sal Soda, Aluminium bronze powder and water; and asked what I thought of it. I have no copy of my answer to this, but have a pretty clear recollection ^{rooting him} that I could not see the advantage of the metallic aluminium over the hydrate, nor of the carb. soda over the caustic, which had all been tried, but if he wished to try it, he should buy some scrap aluminium, which, whilst much more expensive than the hydrate, would yet be considerably cheaper than the bronze powder, costing several dollars per lb, I think; and then pushed him regarding the equivalents of these two forms of aluminium, i.e. the hydrate and the metal, also, on carb. and caustic soda. I think he did then make some cylinders with aluminium bronze powder or scrap aluminium, but again fell back on the hydrate, which they were using in Sept. 1899, when I visited their place for last time, and which was also the time I had pleasure of meeting you.

Regarding analyses my brother made; I find upon looking further back in Laboratory record book, that he made an ash, specific gravity, and alkali determination of a piece of cylinder material "X", and received from Macdonald, on Sept. 23/94, but the complete analyses were begun on Feby 24th and on March 12th/95 and his findings, are:

Analysis of Cylinder Compo. X. Dtry 24th Mar. 12th 95

Stearic Acid	79.580
Mineral Wax	11.790
Resin	0.000
Sodium Oxide Na_2O	4.752
Iron " Fe_2O_3	0.020
Manganese " MnO_2	0.008
Lead " PbO	0.048
Sulphuric Acid $S O_3$	1.641
Aluminium Oxide Al_2O_3	1.998
	<hr/> 99.837
Ash 8.73%	

The book in which I kept memo. of cylinder experiments shows that, on Oct. 20th 1894, I sent Amer. Graphophone Co. 3 samples Composition made with Lead oxide. On Nov 7/94 I sent them 4 samples Composition, of which 2 were made with Hydrate of Aluminium, substantially the same as today, and the other 2 were made with Oxidate of Tin. Then, on Dec. 31st 94, I sent them 2 further samples, together with formula and full instructions written out in a red leather back book. Composition of these 2 samples, were

#1

57 ggs. Stearic Acid
9 " Paraffin wax (133-136 mp)
10% " 37° Caustic Soda Sol.
7/8 " Hydr. Al. dissolved in above

#2

57 ggs. Stearic Acid
12 1/2 " Ozokerite wax
11 " 37° Caustic Soda Sol.
7/8 " Hydr. Al. dissolved in above

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Reason Searic acid is 50 grs. in place of the round number 50, is because of corrections and additions I made to the original charges of 50 grs, on % of composition showing slight disposition to crystallize. These corrections brought the totals up to figures as just stated, and I gave them weights to the Graphophone Co.; now see how religiously they hold on to same, or the multiples of same.

Both of Macdonald's patents, name 408 lbs Searic acid
 These quantities you will note, $\begin{matrix} 7 & \text{Aluminate Hydrate} \\ 80 & \text{37\% Caustic Soda lye} \\ 72 & \text{Paraffin, Glycerine or} \end{matrix}$
 are the weights given in formula 44 Similar mixture

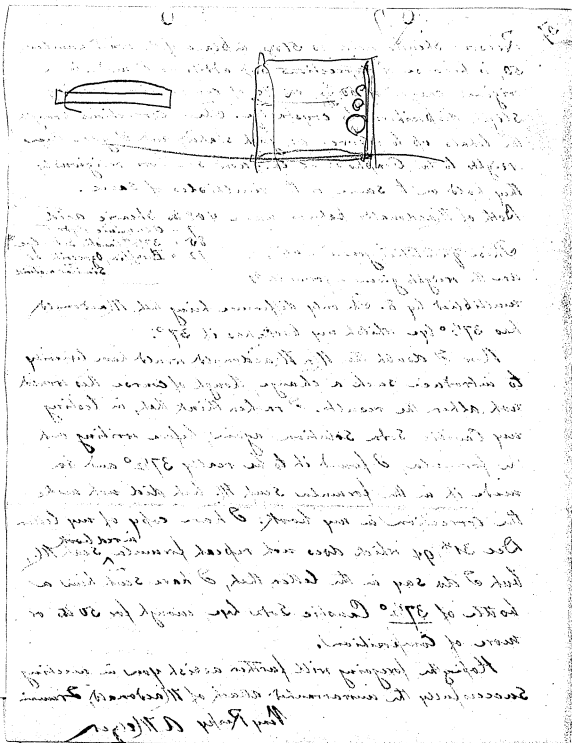
multipled by 8. The only difference being that, Macdonald has 37½% lye which my book has 37°.

Now, I doubt that Mr. Macdonald would have tendency to introduce such a change, though, of course, this would not alter the results. I rather think that, in testing my Caustic Soda Solution again, before writing out the formula, I found it to be really 37½° and so made it in the formula sent Mr. but did not make the correction in my book. I have copy of my letter Dec 31st/94 which does not repeat formula ^{in my book} sent Mr. but I do say in the letter, that, I have sent him a bottle of 37½° Caustic Soda lye, enough for 50 lbs or more of compositions.

Hoping the foregoing will further assist you in meeting successfully the unwarranted attack of Macdonald, I remain

Very Truly A. T. (C) 1905

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MELZER BROS., SUCCESSORS TO

ROLPH MELZER
CHARLES MELZER

HIGHEST AWARDS WORLD EXHIBITION
EXPOSITION UNIVERSELLE
PARIS 1889 AND 1904



A MELZER

FINE

Toilet Soaps

Thos. A. Edison Esq.
Orange N.J.

Covington Ind. June 5th 1905

My dear Sir

Your favor of 3^d inst. is just to hand. Regarding high temperatures for cylinder composition, would say that, as stated in a former letter, I do not consider high temperatures essential, and can not see that products of carbonization in the cylinders would be beneficial. By "fibrous matter," Macdonald has reference to fine particles of lank dust etc. floating in the air and getting into the composition in spite of all precautions. This is all loss, and he cannot destroy these impurities with a high temperature, without destroying the stearic acid also. What the high temperature does, is that, it volatilizes the glycerin and lighter hydrocarbons, which, if present in any considerable quantity, will exude from the cylinders in ~~the~~ course of time. A far more rational way is, to remove these objectionable substances from the cylinder materials beforehand.

In soap making proper, the temperatures are kept down to the minimum, to insure a light colored product, and with this always in view, I employed moderate temperatures, ranging as I now see by looking over my memorandum book, from $130-180^{\circ}\text{C}$. Of course, it happened in some of the many experiments I made, that during temporary absence from laboratory, the temperature would run up far above 180 , but I always looked upon this as an unfortunate accident, and generally discarded that batch of composition. I still maintain that, removal of all objectionable substances from the materials preparatory to their combination at within the limits of $130-180^{\circ}\text{C}$., is the correct plan.

Macdonald's application for first patent, was filed Nov. 27th 1896. This is nearly 3 months after date of his letter to me in which he reports to me on what he has heard regarding your cylinders; as the temperature named in his specification, is 300°F ., it would seem that he had not heard of any high temperature you are using, or preferred the low temperatures advocated by me. However, I find that, in his letter to me dated Feb. 2nd 1899 he says: "We have also found that we cannot successfully make the mixture in steam-jacketed Kettles. We now use direct heat, and raise the mixture to over 450°F . before calling it finished. It is quite a problem to get it just as you want it though. Even with the utmost

3.

Case, we lose some from the various causes, such as crystallization &c."

It may be that he has some just claim to the high temperature, but can a person patent a temperature? If Macdonald can get a patent on a temperature of $450-475^{\circ}$, you might get one on $475-500^{\circ}$, and then I will come along and claim everything below 450° and above 500° . This looks ridiculous to me.

In this connection, and for your information, allow me to call your attention to the temperature mentioned in your testimonial to Burkhard of Brooklyn as per enclosed catalogue. We use steam-jacketed Kettles but not copper ones, as copper is quickly affected by Caustic Soda lye. Mr. Burkhard does not know this, and has been sending us his catalogue from time to time, in which we noticed your testimonial, and saved the catalogue in drawer containing ^{literature on} soap-making apparatus.

I don't know what the trouble is all about, but think you can afford to let Macdonald have his frying pan temperature; the best cylinders are not made by a scorching process, and crystallization is prevented by arresting the mobility of the molecules and by the interposition of a substance that prevents their grouping together. In cylinder composition, this substance is aluminum.

Ever at your Service, I remain

Very Respectfully A. McGeer

MELZER BROS. SUCCESSORS TO

ADOLPH MELZER
CHARLES MELZER

HIGHEST AWARDS WORLD'S COLUMBIAN
EXPOSITIONS CHICAGO 1893
PHILADELPHIA 1876



Cornwall, Ind. June 6th 1905

Prof. A. Edison Esq
Orange N.J.

My dear Sir

Enclosed please find letter from
Dr. Cathmann of 3^d wish, in reply to my request, as to
what he remembers about our conversation Aug. 1894
regarding Macdonald's inquiry.

The doctor's recollections of this matter are faulty.
The occurrence was as reported to you in my letter May 14th.
I called on Mr. Cathmann at his office, in Aug. 1894, and
in the course of our conversation, he took from his desk
drawers several letters that puzzled him, read them to
me and then asked for my opinions. Outside Macdonald's
letter, I remember contents of only one other, in which
the writer inquired about the value of Red oil (Coul.
Oleic acid) for soap making, as compared with tallow.

I told Mr. Cathmann what to say to those letter writers,
and that I would write to Macdonald myself, offering
to undertake those experiments, as the subject interested
me much. It seems, after getting back home, I wrote

2. to Mr. Genthmann for a copy of Macdonald's letter, and received a typewritten copy on back of a "Chicago Dramatic News" letter sheet, without date or signature. A copy of this I sent you in my letter of May 26th.

You will note, Dr. Genthmann thinks I have some letters from him on the subject, but he does not say that he has or will look up any letters on the subject, for the very good reason that the doctor is not a methodical man and has no files of papers. I have looked up his letters and Enclose the one of Sept 29th 1894, which may amuse you.

Altogether, my records on this case are so complete that, the Doctor's recollections, would throw no additional light on the subject, and it might be best to neglect them.

With kind regards, Dear Sir

Very Respy
A. M. Elzer

MELZER BROS. SUCCESSIONS TO

ADOLPH MELZER
CHARLES MELZER

HIGHEST AWARDS WORLD'S COLUMBIAN
EXPOSITION CHICAGO 1893
FOR DECORATED AND TRANSPARENT SOAPS.



Cornwall, Ind. June 8th 1905

Thos. A. Edison Esq.
Orange N.J.

My dear Sir

Your telegram yesterday evening, asking if I can meet your attorney at Evansville next Tuesday or Wednesday, was at once answered in the affirmative.

And now, please allow me to make a suggestion.

A short time ago, I read somewhere that, in a social talk about the skeleton in the closet, one of the parties held that, there is absolutely no one without a fault and without a fear, and to prove his assertion, he sent to a certain bishop, who was universally considered to be a paragon of goodness and purity, the following anonymous message, "All is exposed; warrant for your arrest in hands of the sheriff; flee for your life." And, strange to say, that bishop did flee, and has never been heard from since. That story is so good, it ought to be true; but whether it is or not, McDonald certainly has more reason to fear exposure than that bishop

24.

Could have had. At same time, I believe lawsuits are good things to avoid, and the sweetness we derive from an act of revenge will not compare with the sweetness there is in forgiving our enemies.

Both, you and I, are getting dangerously near to that time in life, when, to quote M. Cullen Boyack, "where each shall take his chamber in the silent halls of death," and we wish much to go there, burdened with the impedimenta of unfinished lawsuits. Accordingly, I wish to suggest to you, to write Macdonald from Orange, or, if you believe it would be more effective, let your attorney write him from here, about as follows: Have all the evidence to prove that you did not invent Cyclotron composition patented by you. At request of A. Melzer I suggest that you withdraw suit at your expense. Write answer.

----- Attorney for D. A. Edison.

What do you think of it?

Very Respy
A. Melzer
Tell him we don't care about
the suit, what we are trying to do
is to destroy his future activity
as a thief. —

MELZER BROS., SUCCESSORS TO



Cincinnati, Ind. June 14th 1905

My dear Mr. Dyer

As per my promise to you, I promptly
went to work copying memoranda from my note
book of experiments, and discovered after couple of
hours that I had really undertaken a bigger job
than I had bargained for. I will not do anything
by half, and to do this whole, and do it right, would
require several days steady work. Heretofore, I have
worked for days and even for weeks and months on
things that promised neither wealth nor glory, and
can do it again; however, it seems that suddenly
my enthusiasm in emulating Lady Bonifida and
Happy Hooligan (or do those good people emulate me?)
is waning. After working couple hours on these
memoranda, I remembered that up to this moment,
I had not received word of acknowledgment or thanks
from a certain firm in Cincinnati in whose behalf
I had spent several days of my time; had sent them

2.
over week ago, and exhaustive report and opinion on
a lawsuit which another firm had brought against them
for infringement; and as valuable proofs and defences
included with this a \$5.- book and collection of fruit
Soaps which I had imported from Germany several
years ago. I also remembered that, another soap firm
who had asked my assistance, (and got it) had not yet
returned certain books and papers, which they borrowed
for a few days, and which they have now had several months,
although I have demanded them repeatedly; and then I
remembered, how the Am. Frt. Agh. of a certain R.R. Co.
recently asked my opinion and advice in a matter
on which I could enlighten him, and how the very
next day our train was caused to run away through
the undeniable fault of the employees of that R.R. Co.,
and how the Frt. Agh. laughed when I asked him
to pay the direct damage (\$48.²⁵) this runaway caused
to us; and after these various recollections, which do
not exhaust list of our disappointments, I got tired
for the first time in many years, and said to myself:
I promised Mr. Dyer that, I would do so and so,
however, I see that I have been a blamed fool long
enough; now I am going to be wise forthwith, and

3, as the wise man is praised for his wisdom of changing his mind when he discovers that he is wrong, the first thing that I will do, now that I am wise, will be to change my mind with regard to copying this book, for if it is a wrong I am perpetrating upon myself.

I have written quite a number of letters to Mr. Edison in past years, but never received the scratch of a pen from him in reply; not even his signature to a type-written letter as in the case of the last two or three. He would not accept my nice big cylinder as a gift, & would not fill my order for 50. Concord records of a humorous nature to cheer up my sick brother in Denver who made the analysis of Tech Comp. X. Now, if I were to ask Mr. E. to sit down for 3 or 4 days and write out for me a copy of his book re experiments on cylinder Comp., what do you suppose he would say or do?

Of course, Mr. Edison is Mr. Edison; but after all, is he so vastly superior that he can consistently ignore me, and in return expect unlimited favors from me? Mr. Edison is a very deep thinker, who has made many commercially valuable inventions, and has failed in many more; I am not as smart as Mr. Edison, but, knowing my limitations, concentrate my efforts upon few things, and have never fallen down absolutely. I am also older than Mr. Edison.

4. Now, don't get mad about this, my promise to you on the other matters, stands, and my note book and all the other papers, will be produced in evidence if so ordered by the Court, in case Mead goes ahead with his suit.

I hope you will not regret your trip to Evansville; we had a fine time; and I hope you will not tell Mr. Edison how much beer I drank, for if you do, I will tell somebody else that you came to our town on circus day, that I saw you in various saloons playing the slot machines and winning invariably ten cigars for every nickel you dropped in. Strange, isn't it? How else left with the circus.

I feel jolly; so does Macduff; how are you?

Cordially yours

A. H. Meyer

June 20th, 1905.

Adolph Melzer, Esq.,
Evansville, Indiana.

My dear Mr. Melzer:-

I was sorry to receive your letter of the 14th inst., because I think that you have misjudged both Mr. Edison and myself. So far as I am personally concerned, you will recall that when I suggested that you should give us copies of extracts from your note book, I was particularly anxious not to impose on your good nature and asked you several times whether we were not making too much of a request of you. I saw that the copying of these extracts would be a laborious job, but you seemed to be so entirely cheerful over the prospect of night work that I did not know that you looked upon it as a task, but rather as something that appealed to you as a pleasant occupation. Now that I understand the situation, I cannot, of course, complain of your decision, although I am sorry to have you put my request in the same category as the other cases you mention, where your good nature was undoubtedly imposed upon. If you will let me know what you think we should pay for your time in copying these notes, I will send you a

No. 2 - Adolph Melzer, Esq.

check for the same; or, if you cannot spare the time to do this I am willing to pay a typewriter for making such copies. At any rate, I hope you will not now refuse to let me have the copies of the notes, because that would put me in an embarrassing position, as I have told Mr. Edison that you had promised to let me have them.

So far as Mr. Edison is concerned, of course you will understand that he cannot be judged by the same standards as other men. He does the work of four or five ordinary men, and I know that his mind is simply overburdened with harassing and wearing problems. If he confined himself to his scientific and inventive work, he would have more time to devote to personal and social matters, but in addition to his experimental work and the running of his Laboratory, he makes it a point to keep in touch with the multifarious and perplexing questions of business that daily arise in connection with his many commercial interests. Under these circumstances, he must necessarily leave the handling of details to his assistants, and his correspondence therefore is generally carried on by secretaries under his direction. You must not feel for a moment that there is any lack of appreciation on his part of his indebtedness to you in this matter, and I know that he is grateful for your kind efforts to assist him. I have suggested to him that he should write to you himself, making this point clear, but I have not told him of your letter to me, and I think he would be deeply hurt if

No. 3 - Adolph Melzer.

he felt that you believed for a moment that he had any intention of imposing upon you or of taking an advantage of your good nature.

You refer to the fact that Mr. Edison would not accept your big cylinder as a gift. It seems to me that his position in not accepting the same, because as he frankly explained to you, he could not use it, was certainly more ingenuous than would be shown by most people, who might take it without any thought whatever of using it. He certainly had no idea that you would be offended by perfect frankness on his part. So far as concerns your order for fifty concert records, that is a matter that he knew nothing whatever about, and he does not know to this day that such a request was ever made by you. If he had, I am sure that he would have at least tried to have the order filled if it were possible.

I hope that you will take this letter in the right spirit, as I think that your position is wrong and that you should be put right. My visit to Evansville was a very pleasant one, and I enjoyed meeting you very much indeed, and can only hope that the same frankness and good nature may characterize our correspondence that marked our personal intercourse.

Please accept my best thanks for the excellent picture of Macduff. Give him my regards, and believe me always -

Faithfully yours,

FLD/ARK.

CHARLES MELZER
5701 EAST COLFAX AVENUE

Blue 3112
TELEPHONE WHITE-547

MONTCLAIR, COLORADO

July 14th

1905

Frank L. Lyon Esq.
Orange N.J.

My dear Sir



Your favor of 7th inst. has come to hand, and am surprised to learn that the Graphophone people intend to go ahead with suit anyway. This is contrary to what I had expected. As I understood Mr. Macdonald, it is your people who are the aggressors, and he filed counter-suits merely as a measure of defense. From this I believed that, if you would withdraw your suits, he would withdraw theirs; and what Mr. Macdonald didn't just say so, I got the impression from the general conversation, that he would welcome an amicable settlement.

From remarks made by Mr. Macdonald, I infer he takes the position of being the inventor of the Cylinder Comp. which he had patented, all had some minor details which he employed us to work out for him. How well he will succeed in proving this, I will not predict, but could tell you exactly if the practice of law and dispensation of justice were an exact science. Anyway, I think Mr. Macdonald ought not to risk a trial in Court.

Further I understood Mr. Macdonald to say that your suit against his Co. is for using Carnation wax, which infringes on the Lyellworth patent. If this is so, I think you make a mistake,

Carnauba wax, as well as every other wax resin and gum, has been used, at least experimentally, for cylinder comp. If my memory serves me correctly, cylinders containing Carnauba wax were rather noisy, they crackled, but of course, this would not be the case in molded records.

I think Mr. Macdonald also mentioned that a trial in Court might result in invalidation of his patents as well as the later patents on Cylinder Comp. Maybe I did not understand Mr. Macdonald correctly in this, but believe I am reporting substantially correct.

I will not presume to advise you in matters legal, but in a general way, think it is not good policy to "claim everything". Claim only that which you know is yours and then make no concessions. This policy, I believe has kept us out of Court during the 34 years we have been in business. We have on several occasions been threatened with all kinds of law suits, but by restricting ourselves to our absolute rights and then taking a firm stand, our opponents would always back down.

Mr. Edison certainly made a good phonograph cylinder before the Amer. Graphophone Co. they wished to duplicate this cylinder or make something similar and equally as good, and upon the meager information furnished by Macdonald, we worked out the formula which he had patented. On addition, he patented practically the formula obtained from one of Mr. Edison's men, adding only that in place of Aluminum bronze powder, use of aluminum might be used, etc, which is in accordance with advice from us.

I still hope the Graphophone people will surrender of withdrawing their suit, and on the other hand, hope you will give them opportunity to do so.

CHARLES MELZER
6701 EAST GOLFAX AVENUE

TELEPHONE WHITE 317

MONTOLAIR, COLORADO, _____ 190__

I find my brother a very sick man; it seems practically all his organs refuse to act, and whilst he may linger in this condition for some time, there seems to be no hope of getting on his feet again.

Please give my regards to all your people and say to Mr. Edison that, I have not answered his last letter as there seemed to be nothing more to say, and I did not wish to impose on his time needlessly

Sincerely yours

C. Melzer

July 21, 1905.

Adolph Melzer, Esq.,
6701 East Colfax Ave.,
Montclair, Colo.

My dear Sir:-

Your favor of the 14th inst. was duly received, and I am extremely sorry to hear of the unfavorable condition in which you found your brother.

Regarding the several composition suits, there are no new developments, but if anything occurs of interest I will let you know. Permit me, however, to call your attention to one misstatement made by Mr. Macdonald to you. The aggression came entirely from the other side. We were notified that we were infringing the Macdonald patents, and I replied by stating that they were infringing the Aylsworth patents. The suit against us by the Graphophone people was filed before our suit against them, so much for Macdonald's claim that we are the aggressors.

Mr. Edison sends his best wishes in which I join, and am -

Yours very truly,

FLD/ARK.

MELZER BROS., SUCCESSORS TO

ADOLPH MELZER

OF CHARLES MELZER

HIGHEST AWARD HONOR GOLD MEDAL
EXPOSITION CHICAGO 1893
FOR DECORATED AND PATENTED SOAP



A MELZER

FINE

Roller Soaps

Evansville Ind. Nov. 11th 1905

Frank L. Dyer Esq.

Orange N. J.

My dear Sir

Your favor of 6th inst. to hand, and I thank you very much for calling my attention to the article in Nov. "Strand." It confirms what I said in my last about the elaborate experiments made by various parties in the field of phonics, but this I did not know three months ago. I cannot hope to accomplish what so far has proven unobtainable to those bright investigators equipped with everything needed in the pursuit of that problem, and will drop the matter.

Your statement of the real facts about the Phono card, makes quite a different thing of it than as described in Se. American p. 235. Of course, I could not swallow all that was claimed for it; certainly such low "sonorians" could yield readily under the recording stylus, resulting in a deep but record, yet fees unaltered under the cancelling stamp of the post office. The name "Phon" Verner did not make me less skeptical, either had I still believe the phono card to be something more than a small sized flexible gramophone disc such has been known in use here for many years.

Regarding my proposed novelty as innovation (not improvement) in the phonograph line, wish to say, it ought to be more fully

developed and I ought to take some steps to protect myself
before exposing my project. To ascertain whether your company
would "care to take it up", the men at the head of your
various departments would probably have to be consulted
and chances are even they would find you an annoyance with
your regular goods and machines that it is not advisable to
take up any new thing at the present time. To acquaint
a number of people with my ideas, and who perhaps would
communicate them to others as the most factually funny
thing they had ever heard of, would not benefit me, and maybe
before I found the machine shop that would build for me a
small disc phonograph, some one with the necessary facilities
at his command, would carry out my idea, which I believe to
be quite practical and should also be very profitable as the
proposed novelty could not fail to find large sales here and
abroad.

With regards to my project a little later.

With kind regards, I remain

Very respectfully,

A. H. Love

Have just read your letter again, and it now seems to me that you
have understood me to say, in my letter of 1st that, I have made certain
improvements in phonographs which are expressed in the form of a small
disc machine that I wish to have built. This is a misunderstanding of
my proposed novelty is a new record, which requires a small disc
machine for reproduction. I have not designed such small disc machine
and am not sure that I possess the mechanical ability and
knowledge of disc phonographs to design a good one. That is something
belonging to the physical laboratory of establishments like yours, the
Gramophone Co, Victor Co, etc.

MELZER BROS. Successors to

AUGUST MELZER
CHARLES MELZER



A MELZER

FINE Toilet Soaps

HIGHEST AWARDS WORLD'S COLUMBIAN
EXPOSITIONS CHICAGO 1893
FOR BEAUTY AND FRAGRANCE OF SOAPS.

Frank C. Dyer, Esq.,
Orange N.J.

Circleville, Ohio, Nov. 12th 1905

My dear Sir

Your favor of 10th inst. is just to hand with specimens of "Flower cards" or "Discal cards" as they are called by our English Cousins. Please accept my very best thanks for the same. These cards come from a German firm in London, and the paper cards have been printed in England and Germany, but the discs are probably made by one firm. These discs appear to be made of very thin celluloid, or it may be some other substance, possibly a product obtained from cork (Cassia) or from potatoes, however it does not matter. Some years ago, the National Gramophone Co. sent me one of their discs, one of which appeared to be gutter perforated and which is practically same as discs you sent me, excepting that the latter are smaller and thinner. I should like that there is another Floucard, a French product, approximating the card described in Dr. American, a blank card which will take a record and which when properly protected can be sent through the mails; however I doubt it. You may remember that in my correspondence with Meadons, the problem of producing

a device for taking records transmissible through the mails, was discussed, and this may have also been the dream of many others. On the whole, I fail to see any advantage in a disc record ~~than~~ bearing an abbreviated record of standard selections such as can be bought everywhere in 10 & 12" discs. It would be a different thing, of course, if the Phonograph presented original records and personal communications from the sender.

I am indeed sorry to learn that the Graphophone Co. is pressing its suits against you. It seems Macdonald has fallen violently in love with Aluminium and don't want to divide with anyone. According to an ad in Munsey's Magazine, he is now making a disc machine with an aluminium arm, which produces a mellow aluminium tone. This is quite necessary, for their discs made from Shells and some kind of Earth are anything but mellow.

Yes, I will do what I told you when you were here, although I dislike to testify against Macdonald because of some pleasant remembrances of the past, and I shall therefore prefer that you subpoena me. I presume you will come here personally to take the testimony, and Mr. Markmann (U.S. Commissioner) will supply the stenographer and anything else you may need. Incidentally we can then also talk about the subject of my letter of yesterday.

If Mr. Edison feels a longing for the scenes of his childhood, then bring him along. I believe he worked in Kamsville as telegraph operator. I went to school in Kamsville, and my deceased brother was born there. I will shut down my factory, go with him to Kamsville walk all over the old town and talk phonographs, soap, storage batteries, cement and any

MELZER BROS., SUCCESSORS TO

ADOLPH MELZER
CHARLES MELZER

HIGHEST AWARDS WORLD'S COLLEGIUM
EXPOSITION, CHICAGO, 1893
FOR DECORATED AND TRADING MARKS.



Cincinnati, Ind.

other old thing that I know nothing about.

I am in better shape now than my sister is back here
again to take care of you, than when you were here before.

I remain with kind regards to all your people

Very respectfully
A. Melzer

Nov. 15, 1905.

A. Melzer, Esq.,

Evansville, Indiana.

Dear Mr. Melzer:-

Your letters of the 11th and 12th insts. have been received. So long as the problem of legible speech is not impossible, although we may admit it is very difficult, I do not see why you should give it up because others have failed. Whenever any accomplishment is made in the line of invention, it generally follows unsuccessful experiments by others in other directions. New minds coming into the field and uninfluenced by previous experience, frequently hit upon expedients that bring success. For instance, I have very little doubt but that the next great advance in the phonograph will be made by some one other than Mr. Edison, because, they will start in new lines, while Mr. Edison's enormous experience will really stand in his way.

Regarding the Phono Cards, I do not see very well how the idea of individual disc records can be worked out. All disc records are duplicates made in some hard material from a

No. 2 - A. Melzer, Esq.

wax master, and the master is so fragile that it cannot be tested, so that as a result a matrix has to be made from each master. The great advantage of phonograph duplicates is that the masters can be tested, and if there are any flaws they can be discarded before any additional expense is incurred. Therefore, in order to make the phonograph card with an individual record, the material will have to be some soft substance in which a zig-zag record can be cut, and that would necessarily prevent even its immediate duplication, and certainly its transmission through the mails.

Regarding your improvement in the phonograph line, it seems to me that under the circumstances, it might be well for you to file a caveat in the Patent Office describing your invention. This would protect you for one year and the cost is nominal. The Commissioner of Patents at Washington will send you a copy of the rules of practice on request, giving you full information as to forms, etc. The idea of a caveat is to protect a man during the period of his experimenting, and this seems to be your position. We can talk over this matter when I see you in Evansville. On this point, I am glad to hear that you will give us your testimony, and I will arrange to subpoena you. Would it be convenient for you to do this the latter part of this month, or early in December? I wish also that you would give me the full name and address of Mr. Wartmann, in order that I can prepare the necessary notices. When I go to Evansville,

No. 3 - A. Melzer, Esq.

I will try to get Mr. Edison to go with me, although I am afraid that he will not go. As you know, he is pretty well wedded to his Laboratory, and it is one of the most difficult things in the world to drag him away from his work.

With kind regards, I am -

Yours very truly,

FJD/AFK.

MELZER BROS., SUCCESSORS TO

ADOLPH MELZER
CHARLES MELZER



A MELZER

FINE Toilet Soaps

HIGHEST AWARDS WORLD COLUMBIAN
EXPOSITION, CHICAGO 1893
FOR DECORATED AND PATENTED SOAP.

Cincinnati, Ind. Dec 10th 1905

Frank L. Dyer, Esq.,
Orange N.J.

My dear sir

Your favor of 7th inst. is to hand, and
have communicated the contents to Mr. Neumann.

Scientific American Supplement of Dec. 2nd has a very interesting
article entitled, "An American Phonetic Laboratory in Germany"
which should interest you and Mr. Edison very much, and which
further proves the great difficulties and obstacles in the way
of reducing speech to a visible and legible possibility, by the only
means that now appears available to the experimenter, viz. analyzing
and systematizing the curves produced by a vibrating medium,
usually a glass or metallic diaphragm. The two main obstacles
are, 1st The great differences in the forms of the same sound
produced by different individuals, which difference seems to be
much greater than the individual differences and peculiarities
in chirography; and 2nd The necessarily great length of a sound
or word now recorded by means of the diaphragm. I find
the average word is about 6 inches long when recorded on a 2nd
dia. cylinder at a speed of 125 rev. per min. and 15" when
recorded on a 5" cylinder at same speed. Of course, it is not

Snaf to deception - a word in the form of an undulating line a
yard long, when it is magnified sufficiently to be clearly visible
to the naked eye; and when considering ^{hairs} how very different that
word may look, when spoken in a different voice, the
outlook is not encouraging. Until a means may be found
to reduce and confine the spoken word to a form not exceeding
in size our present writing, or the Chinese or Japanese characters,
^{representing words,} we will probably have to depend upon the ear, rather than the eye
for phonetic intercommunication and direct our efforts to the
improvement of the forms and substance now used for phonographic
records, which I imagine is a matter receiving the full attention
of Mr. Edison and his assistants.

While for reasons stated in the foregoing, and in previous letters,
I consider it a hopeless undertaking in view of the very
elaborate experiments and investigations made by others, to
work on visible and legible speech, I still hold that the
phonographic novelty I have referred to before, should prove
practical and very profitable, and I hope to interest Mr. Edison
in the same on the of its great possibilities in a commercial
way.

Very respectfully,
A. M. Meyer

A. M. Meyer

MELZER BROS. SUCCESSORS TO

ADOLPH MELZER
CHARLES MELZER

HIGHEST AWARDS WORLD'S COLUMBIAN
EXPOSITION CHICAGO 1893
FOR ASSORTED AND TRANSPARENT SOAPS.



Frank L. Dyer Esq.,
Orange N.J.

Evansville Ind. Dec 11th 1905

My dear Sir

Referring to the phonographic
wordly, I have mentioned to you several times, I now wish
to say that, trusting to your discretion, will tell you what
it is, as I have not the facilities, and in other respects am
not in position to carry out completely my proposed invention,
and would like Mr. Edison's cooperation.

My proposition is to impress upon round, square or oval cakes
of toilet soap, phonographic records (on both sides of the cake) which
may then be reproduced on a small and simple machine
now in the nature of a toy, one of which could be put up with
every box of 100 or 144 tablets of the soap. The price of the soap
need not be much more than other good toilet soap, and when
it has served the purpose of phonograph records, could go to the
rubbish stand.

To better illustrate my project, I have today present a piece of
common toilet soap between two blocks of wood upon which
I glued ~~to~~ two discs cut from a graphophone record. Of course,
the record cannot be tested, but there is no doubt in my mind
that ordinary milled toilet soap will take as sharp and clear
an impression of a phonographic record as any of the machines

MELZER BROS., SUCCESSORS TO



Evansville, Ind.

Substances now used for phonograph records, and if the soaps are specially made, and milled and pressed in machinery specially constructed for the purpose, it must give good results as a phonograph record without sacrificing any of its washing qualities. However, the finish of the reproduction would have to be rounded and very smooth.

I send you by Express today, the cake of soap mentioned, which is perhaps as close a representation of the article to buy as was Mr. Edison's original phonograph, however, it will give you some idea of my proposition.

If you think well of it and will send me a metal matrix of phon. record about 2 1/2" dia., I will take impressions on soap which you can test carefully.

The commercial possibilities of the proposed phonograph soap, I think, cannot be overestimated.

Awaiting your reply, I remain

Very respy

A. Melzer

Dec. 16, 1905.

A. Melzer, Esq.,
Evansville, Indiana.

Dear Sir:-

Your favors of the 10th and 11th insts. have been received, and I have ordered and will read with interest the Scientific American Supplement of December 2, containing the article referred to.

On the subject of legible speech, I see no hope for the solution of the problem by anything analogous to a phonograph or gramophone record, owing to the difficulties to which you refer, and particularly the great length of the spoken words. The problem will only be solved in my judgment when some radically new discoveries are made in connection with sound waves. After all, could anything be better than the phonograph, which repeats the words audibly and does not require special education to decipher them?

Regarding your scheme to impress phonograph records on cakes of toilet soap, would there not be considerable difficulty, due to the hygroscopic nature of these soaps? It seems

A. Melzer, Esq. - 2.

to me that the scheme, if it could be worked out practically, would appeal more as an advertising novelty to a soap manufacturer than to a talking machine manufacturer. The soap manufacturer would, no doubt, be able to sell more soap if the scheme was extensively advertised, but the talking machine manufacturer is more interested in improving the quality and permanence of his records.

In accordance with your request, I am sending you today a phonograph record mold, with which you can make some experiments. I suggest that you have a core made so as to pour in the soap between the core and the mold. Care should be taken not to have any air bubbles, and this can be done by keeping the mold hot until the molten mass is entirely limped.

I shall be interested to hear what success you may have with your experiments.

Yours very truly,

FED/ARK.

Melzer Brothers
Soap Manufacturers

Elizabeth, Ind.

Jan. 5, 1906.

Frank L. Dyer, Esq.,
Orange, N. J.

My dear Sir:--

Your favor of the 2d inst. to hand and have read the contents with much interest. Your direction how to make a disc of the metal cylinder, you sent me, I will not follow, believing the result of such an experiment would not compensate for the time spent. I will drop for the present, the cake of soap that sings, as well as the legible speech.

The Neophone records as described in your letter, are made and reproduced same as the Toy graphophone records. I will send you my Toy graphophone, for which I no longer have any use. You may not have one in your collection of talking machines.

Now, as to the contents of the second page of your letter, would say, the mode of operating in making your cylinder composition was quite a surprise to me, and I would give much if my poor brother was still among the living and could explain to you the correct principles to be observed. As a soap maker and soap chemist he had no superior, and I was much pleased, when he, after hearing of your difficulty with Macdonald, took new interest in phonograph cylinders and expressed his intention to make some experiments with me when I would come to visit him the past summer. Alas, it was not to be.

To say the least, it is very impractical to dissolve Acetate of Aluminum in Caustic Soda Solution, to produce Aluminate of Soda; to decompose Stearate of Soda with a solution of Alum, to make Stearate of Aluminum; or to employ metallic Aluminum (particularly the high priced powder) in place of the hydroxide or hydrate, which is the only correct

Melzer Brothers

Soap Manufacturers

Elmhurst, Ill.

form. If, what you say in your letter, is brought out in court, and your opponents are posted on chemical reactions, as they should be, they will make fun of you. What would you think of a Soapmaker who saponified his tallow with the metal Sodium, or attempted to saponify it with the Acetate or Sulphate of Soda? The hydrate (Caustic Soda) is the only proper form, unless he uses fatty acids in place of the glycerides, in which case he could use either the hydrate or carbonate. In the case of aluminum, we have no carbonate. When ten years ago I started on the cylinder composition and made a couple of lots with Oxide of Lead, which proved unsatisfactory, brother or myself suggested aluminum; my brother did not hesitate a minute about the form. "Dissolve the hydrate in Caustic lye", he said, and as I could find no hydrate Al. in the laboratory, he told me to dissolve Alum in water, precipitate the Alumina with Carb. Soda solution, wash the precipitate repeatedly and dry at moderate temperature. Enclosed is a sample of that hydrate of Al. made ten years ago and of which there is a pound or so left in our laboratory.

When my brother made analysis of "Composition X", several months after making cylinder Composition with Alumina, he was much puzzled over the large amount of Sulphuric Acid it contained, and then made a second analysis with same results. He could not make the Sulphuric Acid and Alumina found, correspond to any form of Al. Salt, but had he seen your letter while living, he would have discovered solution of the puzzle at once in the Sulphuric Acid you introduced in the form of Alum Solution.

As to the results obtained by one and the other process, there is certainly a difference, and a very considerable percentage of Acetic

Melzer Brothers
Soap Manufacturers

Evansville, Ind.

or Sulphuric Acid in the composition is surely not desirable. I believe Macdonald claims the Hydrate and Metallic Al. as his improvement; you can prove that you used Aluminum Salts and Aluminum Bronze-powder before his patent. As to the legal merits, I am not competent to give an opinion, but if the Court gives him the sole right to the Hydrate and gives you the right to the Aluminum Salts and the metal, you will both be ⁷alright.

Very respectfully,

A. Meigs

Melzer Brothers
Sweep Manufacturers

Elmwoodville, Ind. Jan. 5, 1906.

Frank L. Dyer, Esq.,
Orange, N. J.

My dear Sir:--

As per my letter of this date I have sent you, by express, the Toy graphophone also the phonograph parts I ordered shortly before your visit to our city, for converting my concert machine to standard cylinder size. Mr. Edison having kindly presented me with a Triumph machine, I have changed my old machine back to the concert size and now have no use for the parts, which together with the Toy graphophone, please accept with my compliments. However, I will let you "pay the freight" on the same.

Very respectfully,

A. Melzer

Jan. 11, 1906.

A. Melzer, Esq.,

Evansville, Ind.

My dear Sir:--

Thank you very much for your letters of the 5th inst. accompanying the toy graphophone, which I shall add to my collection of phonograph relics.

I showed your letter to Mr. Aylsworth, and he says that the reason why he did not commercially use aluminum hydrate in the early days, was the difficulty of getting that material in pure form. The acetate was entirely satisfactory so long as the acetic acid was entirely expelled. Later alum was used on account of its cheapness. In every case, of course, the desired end was to secure stearate of alumina which possessed the property of curing the crystalline troubles in the stearate of soda. It seems to me that whatever process is used, whether we employ metallic aluminum, aluminum hydrate, aluminum acetate, alum, or any other aluminum salt, the result secured is always the same, namely, the production of stearate of alumina.

In speaking with Mr. Mauro yesterday about these suits, he made it perfectly clear that he will argue that you acted merely as a skilled workman carrying out Mr. Macdonald's instructions. He seemed to feel that this would be brought out

A. Melzer, Esq., --- 2

by your letters, but I do not see how that could be since, as I understand it, your suggestion of the employment of aluminum was made entirely independently of Mr. Macdonald who attempted only to make use of lead. Did Macdonald at the time of his original disclosure to you employ stearate of soda with free stearic acid?

Another statement made by Mr. Mauro, that I think will interest you, was that you had been fully paid for your work. I of course did not argue this point with him, but if this is his understanding, he must have been misinformed by his clients.

The taking of testimony is dragging along very slowly, and I shall probably not get out to Evansville until next month.

With best wishes for the New Year, believe me,

Yours very truly,

YLD/MM.

MELZER BROS., SUCCESSORS TO



A. MELZER

FIN

Roller Soaps

HIGHEST AWARDS WORLD EXHIBITION
EXPOSITION UNIVERSALE
FOR DECORATED AND TRANSPARENT SOAP.

DOLPH MELZER
JAMES MELZER

Frank L. Dyer Esq.,
Orange N.J.

Evansville Ind. Jan. 31st 1906



Dear Sir

Your favor of 29th to hand. Have communicated with Mr. Hartmann, who says that he has a case in Court on Feb. 12th, but can give you 13th and days following. I will also arrange my business accordingly and will wire you the substance of this tonight.

Better bring the "old man" along; maybe I can tell him something about Caustic Soda and Caustic Potash that will interest him. Possibly we can also concoct a new soap for use in the storage battery in place of those briquettes and flake graphite, that will make it a horning success instantaneously. Remember what Emperor William said at the Medical Congress: "Seife, meine Herren, Seife ist die Hauptsache".

Very respectfully Yours

A. Melzer

If you think the 13th is an unlucky date, then make it the 14th.

Feb. 3, 1906

A. Melzer, Esq.,
Evansville, Indiana.

Dear Mr. Melzer:-

Your favor of the 31st ult. has been received. I served notice on Mr. Mauro that we would proceed with your testimony at Evansville on Monday, the 12th inst. and explained that Mr. Wartmann would not be able to attend that day, except to administer the oath. This was satisfactory to Mr. Mauro, and I presume Mr. Wartmann has no objection.

Mr. Melville Church of Washington, D.C., who is associated with me in these suits, expects to go with me to Evansville, in order to assist in the matter of taking your testimony, as it is very important that there should be no technical slip. Mr. Church tells me that you are an old client of his, and he looks forward with pleasure to meeting you again. We expect to leave next Thursday afternoon and will reach Evansville Friday evening. This will give us all day Saturday to talk over the matter with you before commencing with your testimony on Monday.

Yours very truly,

FLD/ARK.

MEMORANDUM

for Mr. Edison.

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-1-

According to Mr. Aylsworth's testimony, the development of the blank composition was as follows:-

He commenced work in Jan. 1888 (p. 11, Q.6). He says that at that time the composition in use was composed of 100 parts coresin and 30 parts carnauba wax (p. 11, Q.8). The first experiments, upwards of 700 in number, were carried on in connection with the mixing of "natural waxes, gums and resins in various proportions" (p. 14, Q.15). The next step was the manufacture of metallic oleates, such as oleate of lead (p. 14, Q.16); then followed the manufacture of metallic palmitates (p. 17, Q. 24), and finally, the manufacture of metallic stearates (p. 18, Q.29). Experiments were also made with "other sources of fatty acids than stearate and oleic, and combinations of the same with certain amounts of stearic and oleic, such as cocoanut oil, palm oil, cotton seed oil and peanut oil" (p. 21, Q. 36).

Under date of August 31, 1888, the following note was recorded:-

"A serious obstacle was here found in all cylinders made of cocoanut oil, palm oil, cotton seed, and in fact all of the oils and fats, in the shape of minute bubbles, which could not be seen by the naked eye, but could be

very distinctly heard in the phonograph as a crackling and scratching noise, and could be seen under the microscope. These were found after a series of experiments to be caused by glycerin decomposing slowly while the wax is melted, giving off acrolein and water, also, to the vaporization of the glycerin. It was found that glycerin always occurred in the wax unless it was especially well made and washed with alcohol after precipitating or other processes, which would make it too expensive for practice. The point at which the bubbles formed could be raised by heating the melted wax very hot and letting it settle and then to the temperature required in molding. But this operation spoiled the quality of the wax, and then great care had to be taken to run it high enough each time, and not to let it get too high in molding, which altogether made it impracticable, so the only way left was to use fatty acids and not neutral fats or oils." (p. 21, Q.37).

NOTE: This is important because Macdonald, in his patent, points out the importance of having stearic acid free from glycerin.

The metallic oleates, palmitates and stearates first made, and above referred to, were all hydrated, the neutral soap being first formed, precipitated by a salt of the metal desired.

The next advance was the manufacture of stearate of soda by saponifying stearic acid by caustic soda, the saponification being about 70%. Aylsworth's note reads:- "This makes a soap of a light brown color with a very high melting point, which when poured out and cooled becomes

amorphous on the cooling surface, but crystalline on the inside. It is almost perfection on the phonograph, (the amorphous outside,) as far as articulation, cut and scratch are concerned, but when the cooling surface has been cut through, it becomes scratchy and no good. Also will absorb moisture on hot damp days which would spoil any record put on it." (p. 24, Q. 43)

The next step was to reduce the tendency to crystallization in the stearate of soda, and Aylsworth's experiment #858 records the use of acetate of alumina dissolved in water with caustic soda, forming aluminate of soda. The note reads:-

"The object of this experiment is to take the crystallization out of the stearate of soda and to make it mold better. It came out bang up, non crystalline, good cut, molded first-class, but was electrical - not so likely to absorb moisture". (p. 26, Q.47)

Experiments were made with this composition to get the correct proportions and the degree of saponification being gradually reduced, and the final proportions adopted were stearic acid 14000 grams, caustic soda 100 grams, and acetate of alumina 433 grams, the composition being No. 871. This composition was regularly adopted by the Edison Phonograph Works. It was found that this composition, (stearate of soda, free stearic acid and stearate of alumina) was too hard to be effectively turned by the steel knives then in use, and the composition was then changed

(#957) by the addition of a small proportion of oleic acid (red oil) as a softener, and this composition was duly accepted as regular (p. 38, Q.72). When this composition was adopted the weather was cold, but during the following summer, it was found that records and blanks made of #957 were affected by the moisture, due to the fact that the oleate of soda found was slightly soluble (p.40, Q.78). As a result of this observation, it was also found that the stearic acid which was then purchased contained oleic acid in considerable quantities and "samples were obtained from Mitchell & Company which were very hard and free from oleic (page 41).

NOTE: This is important, because Macdonald points out that stearic acid should be free from oleic. Aylsworth, however, says that all commercial stearic carried from two to five per cent of oleic, which is unimportant.

One of the difficulties experienced in the early days was due to the presence of mildew, caused by the failure to drive out all the acetic acid, resulting from decomposition of the acetate of alumina. (p. 42, Q. 81) As a result of the difficulties with oleic acid, ceresin was used as a softening ingredient, and composition #1029 was made, in which acetate of alumina was still used. (p. 43, Q.84) This composition was regularly accepted by Mr. Edison, and put into use by the Phonograph Works. The next experiments were to find a cheap substitute for the expensive acetate of alumina, and it was proposed to make the stearate of alumina as a separate ingredient, which could be

directly added during the process of saponification. This was done by completely saponifying stearic acid by means of caustic soda, precipitated with alum and washing and drying the precipitated aluminum stearate. (p. 43, Q.85)

A plant was started having a capacity of 500 lbs. per day of aluminum stearate, which was known as #1 powder. Experiments were made to obtain the correct proportions and formula #1046 was adopted, in which stearic acid was first incompletely saponified and then stearate of alumina and ceresin were added. This composition was then duly accepted as regular. (p. 45) In the manufacture of formula #1046, Aylsworth refers to the fact that the temperature at the end of the operations "was between 400 and 450° F. or as high as it could be carried with safety." (p. 49, Q.100)

NOTE: This is important, because Macdonald's patent claims the use of a high temperature,; as a matter of fact, we have always used a temperature of over 400 degrees at the end of the operation.

This composition (#1046) was made prior to August 14, 1889. Can Edison corroborate this date by reference to his trip to Europe?

The next experiment was in the substitution of carbonate of soda for the caustic soda which was done on August 14, 1889 (p. 51). After the adoption of the formula in which the stearic acid was saponified, by carbonate

and in which stearate of alumina was added after being precipitated by alum, operations were carried on at Silver Lake (p. 60, Q. 125) where the high temperatures were still used. Aylsworth left Silver Lake in January 1891, being succeeded by Walter H. Miller. At Silver Lake the wax composition was made by the Edison Manufacturing Company and upwards of 425,000 lbs. were shipped to the Phonograph Works between May 1890 and May 1896, when operations were again resumed at Orange by the Phonograph Works. In October 1895, some trouble was experienced with the wax and Aylsworth again took up experimental work thereon. He concluded that the manufacture of stearate of alumina was likely to result in impurities and decided to use metallic aluminum, first in the powder form. (p. 67) The powdered aluminum was first dissolved in a small quantity of caustic soda to form aluminate of soda, which was then added to the kettle in which the stearic acid was partially saponified by sal-soda. This metallic aluminum process was regularly adopted by the Edison Manufacturing Company before the manufacture of wax was resumed at Orange by the Phonograph Works. About the time the Phonograph Works took up the manufacture of wax at Orange, sheet aluminum was used, instead of powder. Aylsworth says that he invented the metallic aluminum process (p. 140, XQ323) and that he suggested the substitution of sal-soda for caustic soda, but that this was done with Mr. Edison's approval. (p. 141, XQ.328-329) He also states that the substitution of stearate of alumina made by the alum process for acetate of alumina, as previously used, was the result of conferences with Mr. Edison. (p. 142, XQ.335).

He also says that he suggested the use of acetate of alumina (p. 143, XQ,340) but that Mr. Edison had previously made stearate of alumina by mixing the chloride with stearic acid and heating to a high temperature (XQ,341). He also states that Mr. Edison suggested the use of stearate of soda (p. 144, XQ,350), which was the basis of all of these compositions.

-2-

In addition to corroborating the above story as told by Mr. Aylsworth, as far as possible, there are certain exhibits to be proved by Mr. Edison. First, a note in Aylsworth's note book #1000 in Mr. Edison's handwriting following entrance made by Aylsworth. We should prove, if possible that this note was made by Mr. Edison subsequent to the preceding notes of Aylsworth. Second, a comparison should be made between our exhibits, "Modern Blanks" with the blanks made in the early days to show that the composition is the same. A record made by Wangemann in December 1888 should be indentified (p. 189, Q.10). Third, also two records made in Boston by Wangemann in March or April 1889 (p. 193, Q.30). Also, a doll record made in 1889 (p. 196, Q.45). Also a mailing cylinder similar to those sent to Colonel Gouroud in 1889 (p. 196, Q.46). Also a lot of records furnished by Mr. Upton and in his possession since 1892 (p. 201, Q.21). Also two records made by Wangemann in Europe in 1889 (p. 203, Q. 75

-7-

and 76), also one of the old yellow wax records (p. 204, Q.79).

-5-

In addition to questions designed to corroborate Aylsworth's testimony and to identify the above exhibits, a few general questions should be answered, as follows:-

Can you state whether or not records or blanks employing the composition formed of stearate of soda and free stearic acid (stearic acid saponified to about 50%,) stearate of alumina (both when added as such by precipitating with alum, a completely saponified or neutral soda soap, and when formed concurrently with the saponification of the stearic acid by the addition of an aluminum salt, such as the acetate) and ceresin were manufactured and sold in this country prior, say, to the year 1891, and if so, whether in large or small quantities? By whom and where sold?

Mr. Redfearn, in his deposition has testified to the purchase by the Edison Phonograph Works and Edison Manufacturing Company between the years 1889 and 1896 of very large quantities of stearic acid, ceresin, sal-soda caustic soda (98%), alum, acetate of alumina and powdered and sheet aluminum. Can you state for what purpose these ingredients were used? Are you acquainted with the fact that these purchases were made? How close a watch did you keep on the business, and especially as to the manufacture of phonograph wax?

Mr. Redfearn has also testified as to the shipments of phonograph wax from the Edison Manufacturing Company to the Edison Phonograph Works during the period of May 1890 and May 1896, and amounting to over 425,000 pounds. Can you state of your own knowledge what was the composition of this phonograph wax? Its use? Whether sold or not?

Mr. Redfearn has also testified to the sales of phonograph records and blanks to the Columbia Phonograph Company and others in this country by the Edison Phonograph Works between February 1889 and November 26, 1892, amounting to over 450,000 in number, and between the latter date and October 31, 1896, amounting to over 750,000 in number. Can you state of your own knowledge of what composition these records and blanks were made? Are you acquainted with and have you ever met Mr. Adolph Melser of Evansville Indiana, and if so, when and under what circumstances did you meet him, and what, if any conversation did you have with him on the subject of phonograph records and blanks.

F.L. Dyer

September 7th, 1906.

C. A. L. MARRIS

RALPH LANE SCOTT

MAURO, CAMERON, LEWIS & MARRIS
430 F ST., WASHINGTON, D. C.

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CODES USED: (LICENSEE
WESTERN UNION
HARBOUR)

NEW YORK

May 16, 1908.



Frank L. Dyer, Esq.,
Edison Laboratory,
Orange, N.J.

Dear Mr. Dyer:-

AMERICAN GRAPHOPHONE CO. vs. NATIONAL PHONOGRAPH CO. (MAGDONALD PATENTS).

I have received copy of your supplemental brief, and have read it far enough to warrant me in congratulating you on a very fine piece of work. Indeed, I can say without flattery that it is one of the best briefs I ever read; and if I add that I am nevertheless satisfied we can reply to it, my confidence is based solely upon the soundness of the propositions of law on which we stand.

Meanwhile, it seems to me decidedly the part of wisdom to consider whether it would not be best to dispose of this case according to the view expressed by the Court, namely, sustaining the patents with a license to defendant. I feel at liberty to urge this view because defendant has nothing to gain by invalidating the patent, but just the reverse. I would advise my client to accept as a quid pro quo a license under the Carmauha patent (a decree sustaining it also to be entered) and the dismissal of the West Virginia suits. These suits may be dismissed without prejudice, as we do not want a license under the patents there involved. That our present operations are not an infringement should be clear to you upon the evidence.

Very truly yours,

PM-H.

Philip Mauro

*Mac
Donald
not*

May 19, 1908.

Philip Mauro, Esq.,
154 Nassau Street,
New York, N.Y.

Dear Mr. Mauro:-

Yours of the 16th inst. is received and
I thank you for your commendations of my supplemental brief.

I could never see these cases from your point of view.
The two Macdonald patents I have always felt were invalid
and tainted with dishonesty. It would be very hard for me
to shut my eyes to these facts.

So far as the Aylsworth patent is concerned, I suggest
ed that my people would be willing to grant a license there-
under for \$10,000., but possibly we might accept a smaller
amount.

The West Virginia suits I intend to press. We may
not succeed, but I shall at least have the satisfaction of
feeling that I have done my best and made every reasonable
effort to protect my clients' interest.

Should you desire it, I will of course be only too glad
to meet you and talk over these matters, because I realize
that litigation is to be always avoided, when possible. At

No.--2 PM.

the same time, our minds seem to be so constituted that it is almost impossible for us to view matters of this sort from the same standpoint.

Yours very truly,

FLD/ARK.

General Counsel.

*Mac Cash
suits*

May 28, 1908

Mr. Edison:--

Regarding the several composition suits, concerning which I spoke to you yesterday, I would like to have your formal approval of the proposed compromise. There are three suits altogether; two in which we are defendant and one in which we are complainant.

The first Graphophone suit is on the Macdonald patent describing a metallic soap with which aluminum is used to prevent crystallization. This invention had been used by us many years before the Macdonald application was filed, and one of the formulas was acquired directly from us through a former employee named Storms. The patent, in my opinion, is absolutely invalid, but unless the defence is brought out, it would be of value in excluding foreign records from the American market.

The second Graphophone suit is based on the Macdonald patent in which the soap composition is formed at a high temperature. This has always been our practice and in my opinion our prior use would be a valid defence, although the invention was independently made and not dishonest-

ly acquired. The patent would have some value in stopping the practice of an infringing process in this country, but would have no value in excluding foreign records.

Our own suit against them is based on the Aylsworth carnauba wax patent. We do not use carnauba wax, and although the claims might in terms be broad enough to include our present composition, there is some doubt on this point. The Columbia Company probably still use carnauba and to enjoin them under the patent would probably drive them to the use of another material. The patent can be effectually used to support our jobbers and dealers agreements and it would be for this reason unfortunate to have it declared invalid, although I would not expect such a result.

Should the cases proceed to a final decision, in my opinion the two Macdonald patents would be invalidated and I have strong hopes that the Aylsworth patent would be sustained and be held infringed. Such a result would open up the market generally and any one could freely use the stearic acid-aluminum soap. The sustaining of the Aylsworth patent would probably not be seriously embarrassing for the Graphophone Company since they could certainly leave out the carnauba wax until some substitute was discovered, although Mr. Mauro tells me that they have been prepared to change their composition in the event of an unfavorable decision.

As a business proposition, I think we should be con-

Mr. Edison

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May 28, 1908

tent to have the Macdonald patents remain in force, because in that way we would have some protection from foreign competition. Under existing conditions I do not see how much would be gained even if we prevailed on the Aylsworth patent. Our principal object has, however, been secured, namely, putting the Graphophone Company to as great an expense in connection with these suits as possible. I recommend, therefore, that the matter be compromised by the Graphophone Company withdrawing their suits and by our withdrawing our suit; by their agreeing not to sue us on the Macdonald patents and our agreeing not to sue them on the Aylsworth patent.

I would like to have your approval of this suggestion.

FED/MTL

C. A. L. MARRIE
RALPH LANE SCOTT

MAURO, CAMERON, LEWIS & MARRIE
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WESTERN UNION
MARCONE }

NEW YORK

June 12, 1906.

Mauro sends
Frank L. Dyer, Esq.,
Edison Laboratory,
Orange, N. J.

Dear Mr. Dyer:-

TRENTON CASES. Enclosed herewith I hand you the original
of proposed letter to Mr. Cliphant, - if it meets with your approval,
will you kindly sign and forward it.

Yours very truly,

RLS-J

C. A. L. Marrie



[ATTACHMENT]

June 11, 1908.

Harry D. Oliphant, Esq., Clerk,
U. S. Circuit Court,
Trenton, N. J.

Dear Mr. Oliphant:-

AMERICAN GRAPHOPHONE CO. v. NATIONAL PHONOGRAPH CO.,
IN EQUITY, #10, MARCH TERM, 1908;
SAME v. SAME, IN EQUITY #11, MARCH TERM, 1908;
NEW JERSEY PATENT CO. v. COLUMBIA PHONOGRAPH COMPANY,
GENERAL, IN EQUITY, #12, MARCH TERM, 1908.

A consent decree, in each of the above-entitled suits, dismissing the bill without costs to either party as against the other, has this day been mailed to Judge Lanning with the request that he sign them. Judge Lanning was asked to kindly request you to notify us of the date of the entry of the decrees.

As there will be no appeal in any of the three above-entitled cases, counsel for the respective parties unite in requesting you to divide between them all printed copies (except the number you are required by law to keep on file in your office) of the record in each of these cases. It will be greatly appreciated if you will kindly forward one-half the number of records to Frank L. Dyer, Esq., Edison Laboratory, Orange, N. J., and the other half to Philip Mauro, Esq., Tribune Building, New York City.

Respectfully yours,

ALS-J

(Sgd) Philip Mauro

Counsel for Amer. Graph. Co. and Col. Phon. Co.

Counsel for Nat. Phon. Co. and N.J. Patent Co.

June 12, 1908

C. A. L. Massie, Esq.,
154 Nassau St.,

Tribune Bldg.,

New York, N. Y.

MACDONALD SUITS AND AYLSWORTH SUIT.

Dear Mr. Massie:-

Your several letters, in these cases, are received. I have signed the letter to the Clerk, Oliphant, at Trenton, asking that the printed copies on file be divided between us, and have mailed this letter to Trenton.

I note that you have mailed the consent decrees to Judge Lanning. Kindly notify me, when you have been informed, of the date of entry of these decrees.

Yours very truly,

General Counsel.

HHD/CNH

**Legal Department Records
Phonograph - Case Files**

***American Graphophone Company v. National Phonograph Company
and Blackman Talking Machine Company***

This folder contains material pertaining to the suit brought by the American Graphophone Co. against the National Phonograph Co. and one of its agents, the Blackman Talking Machine Co., in the U.S. Circuit Court for the Southern District of New York. The case was initiated in June 1909 and involved Richard B. Smith's U.S. Patent 881,831 on a reproducer swivel arm. The selected documents consist of affidavits by Edison, William Pelzer, and Peter Weber, along with three blueprints accompanying Edison's affidavit. Also included is an undated item, probably written by Frank L. Dyer, comparing Smith's patent with reproducer patents issued to Edison and John C. English. Among the documents not selected are the consent decree admitting infringement of the Smith patent, by which the suit was settled in December 1911, and additional affidavits describing methods formerly used at the Edison Phonograph Works for mechanically duplicating phonograph records.

IN THE UNITED STATES CIRCUIT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN GRAPHOPHONE COMPANY,)
Complainant,) IN EQUITY
vs.)
NATIONAL PHONOGRAPH COMPANY) Smith Patent No. 881,831
and)
BLACKMAN TALKING MACHINE COMPANY,)
Defendants.)

- AFFIDAVIT OF THOMAS A. EDISON -

State of New Jersey,)
County of Essex.) ss.:
THOMAS A. EDISON, being duly
sworn, deposes and says:-

I reside at Llewellyn Park, Orange, New Jersey,
and am an inventor. I invented the phonograph upward of
thirty years ago and have devoted a large part of my time
since then to devising improvements upon the same, and
have taken out a large number of patents upon these im-
provements. One of the early structures which I devised
was a reproducer in which the reproducer stylus was mount-
ed upon one end of a lever, which lever was pivoted to a
weight, which weight was, in turn, pivoted to the body of

the reproducer, the other end of the stylus lever being connected to the diaphragm. This reproducer was covered by my United States patent No. 430,278, and went into very extensive use. During the experimentation which preceded the filing of the application upon which this patent was granted, it was perfectly clear to me that the stylus must have lateral play in order to accommodate itself to irregularities or deviations of the record groove; also that the stylus must be capable of bodily movement towards and from the axis of the record cylinder so as to accommodate itself to the eccentricities of the cylinder; and also that the stylus must be weighted so as to be held down to its work. All this is explained in the patent to which I have referred, the floating weight applying the necessary pressure to the stylus and at the same time permitting it to move to take care of the eccentricities of the record cylinder, and the lateral play of the stylus is provided for by making the opening in the lever considerably larger than the pin upon which the lever vibrates. This patent covered broadly the "floating weight" type of reproducer which has been used very extensively up to the present time by the licensees under this patent and after its expiration, by our competitor, the American Graphophone Company.

Prior to the filing of the application upon which this patent was granted, I experimented with various mountings for the stylus lever which would permit it to move laterally with respect to the floating weight. One of these structures consisted of a swivel which oscillated on a vertical axis with respect to the floating weight

and to which the stylus lever was pivoted, the structure being shown in the accompanying sketch marked "Edison Swivel Reproducer". I had several of these reproducers made at my laboratory in West Orange, New Jersey, about this time, which was probably in 1888 or 1889. They were made by Fred Ott, who was employed by me as an instrument maker for the purpose of making phonograph reproducers and other instruments and mechanisms. These reproducers were tried upon phonograph records and operated very successfully. I found, however, that it was not necessary to use this swivel, as the structure shown in this patent No. 430,278 operated perfectly, and as it was much simpler and cheaper to manufacture, I decided not to use the swivel. I considered the latter a mechanical equivalent for the form shown in this patent and did not illustrate it in the patent, although my claims covered it. I have never found it necessary to mount the stylus lever on a swivel for reproducers operating upon records having 100 threads per inch, which have been the only records put out commercially from the early days until the Amberol records having 200 threads per inch were put out by the National Phonograph Company in October 1908.

It was, however, from the earliest times found necessary to use swivel mountings for the stylus levers in the duplicating machines, probably because the duplicating of a phonograph record is a much more difficult proposition than the reproducing of a record, and requires greater mechanical perfection and accuracy in the moving

parts. Therefore, it has been the practice to mount the reproducer stylus on a swivel in all duplicating machines.

Commercial duplicates at the present time are made by a casting or molding operation, but formerly they were made by mechanical transference in a duplicating machine. These machines usually comprised two mandrels rotating on parallel axes, one mandrel carrying a master record and the other a blank to be made into a record. Between the master record and the blank was a lever or system of levers, one of which carried a reproducer stylus for tracking the record on the master cylinder, and another a recording stylus for cutting in the blank a record, which, of course, would be a duplicate of that on the master, since the movements of the recording stylus corresponded exactly to those of the reproducer stylus. In all these machines which were used in large numbers by the Edison Phonograph Works for the production of commercial phonograph records which were sold throughout the United States in very large numbers from about 1891 up to about the present time, the reproducer stylus was mounted upon some kind of a swivel for permitting lateral movement, and this swivel was carried either by a floating weight or by a movable frame to which a weight was applied. These machines were seen by large numbers of employees and visitors to the plant at various times prior to 1901.

I have looked at the drawing of United States patent No. 881,831 to Smith, and I note that the axis upon which the stylus lever oscillates is intersected by

a prolongation of the axis of the swivel member. In defendant's reproducer "Combination K", the axis upon which the reproducer turns is at a substantial distance from the prolongation of the axis of the swivel member. This latter structure is superior to the former in that the stylus lever is more sensitive to lateral movement. This is because there is less friction of the swivel member with respect to its support, due to the fact that the angle through which the swivel member turns with any given movement of the stylus diminishes as the distance of the axis of the swivel member from the axis of the lever increases. In order to make my meaning clearer, I have annexed hereto a sketch marked "Edison Sketch", in which Figure 1 shows the axis of the reproducer stylus intersected by the axis of the swivel, and Figures 2 and 3 show the swivel axis at a substantial distance from the lever axis. The structure of Figure 2 is more sensitive than that of Figure 1 and that of Figure 3 is more sensitive than that of Figure 2.

Thos A. Edison

Sworn to and subscribed before me
this 25th day of July, 1909.

(Seal) Anna R. Klehm

NOTARY PUBLIC, STATE OF NEW JERSEY
COMMISSION EXPIRES, JUNE, 1913.

[ATTACHMENT]

IN THE UNITED STATES CIRCUIT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN GRAPHOPHONE COMPANY,
Complainant,

vs.

NATIONAL PHONOGRAPH COMPANY
and
BLACKMAN TALKING MACHINE COMPANY,
Defendants.

IN EQUITY

Smith Patent No. 881,831.

Defendants Exhibit - EDISON SKETCH

Fig. 1

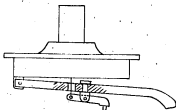


Fig. 2

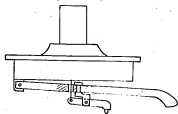
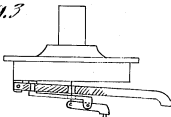
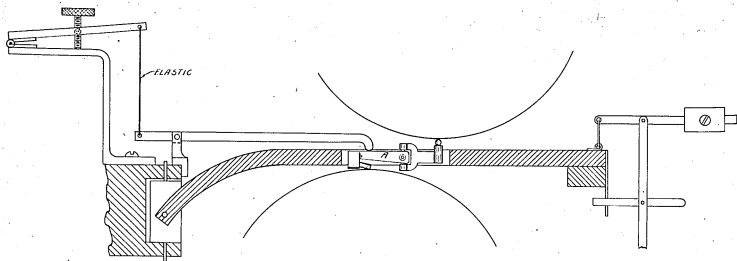


Fig. 3

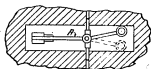


[ATTACHMENT]

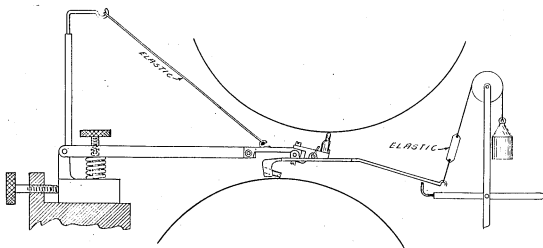


UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.

AMERICAN GRAPHOPHONE COMPANY,
COMPLAINANT,
VS.
NATIONAL PHONOGRAPH COMPANY,
AND
BLACKMAN TALKING MACHINE COMPANY,
DEFENDANTS. } IN EQUITY



DEFENDANTS' EXHIBIT — SKETCH OF ORANGE DUPLICATING MACHINE NO. 1.



UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.

AMERICAN GRAPHOPHONE COMPANY,
COMPLAINANT,
VS.
NATIONAL PHONOGRAPH COMPANY,
AND
BLACKMAN TALKING MACHINE COMPANY,
DEFENDANTS. } IN EQUITY

DEFENDANTS' EXHIBIT — SKETCH OF ORANGE DUPLICATING MACHINES NO. 2.

[ATTACHMENT]

UNITED STATES CIRCUIT COURT
SOUTHERN DISTRICT OF NEW YORK

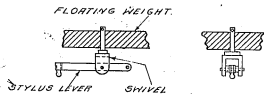
AMERICAN GRAPHOPHONE COMPANY,
COMPLAINANT,

VS.

NATIONAL PHONOGRAPH COMPANY,
AND
BLACKMAN TALKING MACHINE COMPANY,
DEFENDANTS.

IN EQUITY

DEFENDANTS' EXHIBIT — EDISON SWIVEL REPRODUCER.



UNITED STATES CIRCUIT COURT
SOUTHERN DISTRICT OF NEW YORK.

AMERICAN GRAPHOPHONE COMPANY,)
Complainant, : In Equity.
vs.)
NATIONAL PHONOGRAPH COMPANY : Smith Patent
and : No. 881,831
BLACKMAN TALKING MACHINE COMPANY,)
Defendants. :

AFFIDAVIT OF WILLIAM PELZER.

State of New Jersey,)
County of Essex.) ss.

WILLIAM PELZER, being duly sworn, deposes and says: I am the Vice-President of the National Phonograph Company, one of the above named defendants; I have read copies of the affidavits filed on behalf of the complainant herein; I am familiar with all of the negotiations which were had at various times by the National Phonograph Company, acting through its President, Frank L. Dyer, his predecessor, William Gilmore, and myself, Mr. Dyer and Mr. Gilmore having kept me advised as to what was done by them. Mr. Dyer is not in this country at the present time, as he sailed for Europe on July 10, 1909, the bill of complaint having been filed in this suit immediately after his departure.

In August, 1907, William H. Barker of New York called to the attention of the National Phonograph Company an invention of R. B. Smith, and early in September, 1907,

Mr. Smith called upon our superintendent, Mr. Peter Weber, and showed him this alleged invention, which consisted of a swivel attachment for supporting the stylus lever of a phonograph reproducer. Mr. Weber at this time advised me that the scheme was of no use to us, and requested me to tell Mr. Barker that we were not interested in the device, and I think this was done by me.

Shortly after the grant of the patent No. 881,831 to Mr. Smith and in the latter part of March, 1908, this alleged invention was again submitted to the National Phonograph Company, and Mr. Gilmore requested Mr. Weber to report on the same. Mr. Weber reported that Smith's scheme of supporting the stylus lever on centers was a nice way of mounting the lever, but very expensive and unnecessary, and also that the swivel was the same scheme used by us on duplicating machines.

It should be noted that at the time of Mr. Weber's report, the National Phonograph Company was putting out only records having 100 threads per inch, and the Smith reproducer with records of this type was found to be of no improvement over the reproducer in use by the National Phonograph Company then, and for many years prior thereto.

A short time afterwards, about the end of June, 1908, and after the National Phonograph Company had decided to put on the market a new type of record having 200 threads per inch, Mr. Weber showed me a reproducer in which the stylus lever was mounted on a swivel and was adapted for this new type of record. It then occurred to me that it might be advisable to acquire the Smith patent. I did not consider it a valid patent, since such swivels as this were commonly known in this

art, but as it is always expensive and troublesome to defend a patent suit, I thought it would be better to purchase the patent than be put to this expense. I therefore called the matter to the attention of Mr. Dyer, and on July 8, 1908, Mr. Dyer wrote to William H. Barker a letter reading as follows:

"July 8, 1908.

Wm. H. Barker, Esq.,
52 Broadway,
New York.

Dear Sir:

Upon assuming the duties of Chairman of the Executive Committee of this company I find that there was some correspondence with you in August and September of last year in reference to patent of Mr. Smith, No. 881,831, of March 10, 1908. It occurs to me that the company might have some use for this patent for improving somewhat the tracking quality of the stylus. Of course the reproducer would be somewhat more expensive and the advantage gained would be small, but if you would care to take up with me the matter of possibly purchasing the patent I would be very glad to meet you or any other representative of Mr. Smith at my New York office on any Tuesday or Thursday. If you will let me know when you can see me I will arrange definitely to meet you.

Yours very truly,

FED/IWW

Chairman Executive Committee."

A letter was received on July 10th in reply and read as follows:

"New York, July 9, 1908.

Mr. Frank L. Dyer,
The National Phonograph Co.,
Orange, N. J.

Dear Sir: I beg to acknowledge receipt of your letter of July 8th, 1908. In reply would say that Mr. Barker is out of town, but expected to return next week, when the matter will be brought to his attention.

Very truly yours,
(Signed) Wm. H. Barker,
per. K. Breuner."

Mr. Dyer apparently did not succeed in seeing Mr. Barker until August 14th, 1908, at which time he offered him \$1,000.00 for the Smith patent, and Mr. Barker stated that he would submit this offer to Mr. Smith. On August 21st, Mr. Dyer wrote to Mr. Barker asking him if he had heard from Mr. Smith, and on August 27, 1908, a letter was received reading as follows:

"New York, Aug. 26, 1908.

The National Phonograph Company,
Mr. F. L. Dyer,
Orange, N. J.

Dear Sir:

I have learned this morning that the Smith patent that you contemplated purchasing is subject to an option, the exact period of which I have not yet ascertained. I am informed that as soon as the option expires, I will be notified and may then have an opportunity of taking up the question of purchase. I will endeavor to ascertain just how long the option has to run and advise you.

Very truly yours,
Dict. W.H.B. (Signed) Wm. H. Barker,
B."

Mr. Smith afterwards told Mr. Dyer that he had assigned the patent to Mr. Powers on August 18, 1908, and that this sale was made in the office of the Douglas Phonograph Company in the presence of Charles V. Henkel, John Kaiser and others, the consideration being \$2000.

The date of this sale of the patent by Smith to Powers is important because on or about August 13, 1908, a phonograph, together with a number of 200 thread records and the new type of reproducer for playing the records and having the stylus lever mounted on a swivel, was set up at the New York office of the National Phonograph Company at No. 10 Fifth Avenue, for demonstration to a large number of jobbers in advance of the date set

for placing this machine and record on sale, and was shown by me at this time to Messrs. P. A. Powers, Charles V. Henkel and John Kaiser. I noticed that Mr. Kaiser and Mr. Powers examined the reproducer very carefully, but I supposed that they were interested in the stylus which was of a new and original form never before used in the phonograph, and would naturally attract their attention, as these men were all in the phonograph business at that time, Mr. Powers being a jobber of the National Phonograph Company, Mr. Henkel being the president of the Douglas Phonograph Company, another jobber of the National Phonograph Company, and Mr. Kaiser being also with the Douglas Phonograph Company. This disclosure was in a way confidential, because it was the intention of our company to show this apparatus only to our jobbers upon whose loyalty we relied, never suspecting for a moment that any of them would take advantage of this advance information to go after Mr. Smith and buy up the patent for which at that very time we were negotiating. Nevertheless, this was done and the patent was secured on August 18, 1908, in the name of Mr. Powers, but possibly also for the benefit of Mr. Henkel.

Toward the end of the month of August, 1908, and while Mr. Dyer and I still believed that Mr. Smith was the owner of the patent, Mr. Henkel came to me and said that he thought that he could buy the patent from Mr. Smith for about \$10,000. or a license under the patent for \$6,000, but that Mr. Smith would not sell at any price to the National Phonograph Company, on account of the failure of his previous negotiations for the sale of the invention. I told Mr. Henkel that this price was entirely too high, and that we would not pay as much as that.

and that neither Mr. Dyer nor I considered the patent valid, but in order to avoid litigation we would pay a reasonable price for the same.

Some time after this Mr. Henkel told me that he thought the patent could be purchased from Smith for \$5,000., and that Smith thought he was dealing with Mr. Henkel either personally or as president of the General Phonograph Supply Company. Upon consulting with Mr. Dyer, we concluded that it might be worth \$5,000. to secure the patent and avoid "strike" litigation. On or about October 5, 1908, I had a check for \$5,000 drawn to the order of G. V. Henkel and handed it to Mr. Henkel to be used for the purchase of the patent from Mr. Smith. Mr. Henkel reported that Mr. Smith would sell the patent for \$5,000., with the proviso that he was to retain the right to use the device on a "three-diaphragm" reproducer which he had designed, and which was agreeable. In order to be certain that we were not paying more for the patent than Mr. Smith demanded, I had a form of assignment drawn in which the consideration was stated at the full amount of \$5,000. Shortly after this form was given to Mr. Henkel, the latter reported to me several times that the matter had not yet been closed owing to some difficulty between Mr. Smith and his Attorney, and finally on pressing Mr. Henkel for a final answer, he told me that Mr. Smith would not sign the assignment because it stated the consideration at \$5,000., and that the patent really belonged to Mr. Powers who had bought it from Smith before I sent Mr. Henkel the check. This was the first that I had heard of any sale having been made by Smith, and I was very indignant that Henkel had not reported the true situation at once, and even more so to

hear that Mr. Powers had violated the confidence which I had shown in him when I demonstrated the 200 thread apparatus to him at our Fifth Avenue office, by purchasing the patent for the evident purpose of embarrassing the National Phonograph Company. I asked Mr. Henkel to return to me the \$5,000. which I had advanced, and which he did. After this, some negotiations were had with Mr. Powers, but we were unwilling to pay Mr. Powers more than he had paid Mr. Smith for the patent, namely, \$2,000., as we did not feel that he had treated us right, and as we believed the patent invalid, we decided to litigate the questions involved rather than pay the price which Mr. Powers demanded for the patent.

This patent, as I am now informed, is owned by the American Graphophone Company. This company is the manufacturer of talking machines, but I am advised that they are not making any use of the patented structure in their machines, and believe that they acquired the patent for the sole purpose of bringing suit against the National Phonograph Company.

William Pelzer

Subscribed and sworn to before me
this 20th day of July 1909.

(Seal)

Anna R. DeLine

NOTARY PUBLIC, STATE OF NEW JERSEY
COMMISSION EXPIRES, JUNY. 1913.

I

Y8.

State of New Jersey)
County of Essex) ss.

I am General Superintendent of the Edison Phonograph Works and affiliated companies at West Orange, N. J., which position I have held since about the year 1899. Several years ago, and as near as I can recollect, about the year 1902, a man by the name of Richard B. Smith applied to me for employment and I set him to work on phonograph reproducers. For a month or so he was located in a room in the rear of the building at that time used for offices, and after that I found him a place in the reproducer assembly room in the factory. In the part of the office building where he was located first there were

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a number of appliances of various kinds that were left there by Mr. Adolph F. Gall who had formerly occupied the same quarters. Mr. Smith, who was of a very inquisitive turn of mind, had access to all these things and had full opportunity to acquaint himself therewith. There were at that time also a large number of mechanical duplicating machines which had been in use about the factory a few years before. All these mechanical duplicating machines were constructed with swivel reproducer stylus levers so that the reproducer stylus would be free to move sidewise if the groove in the master record did not correspond precisely with the feed screw of the machine. It was the general practice to equip mechanical duplicating machines in this way, and Mr. Smith in his employment in the factory and in the office building could not have failed to observe these duplicating machines, some of which had then been thrown aside because they had been replaced by molding machines and were no longer in use.

During the year 1907 this same Richard B. Smith again came to the Works and offered to sell us an application which he had made for a phonograph reproducer in which the reproducing stylus was swiveled in the floating weight. This patent being valueless in my estimation because it covered no more than the swiveling of the reproducer stylus in the floating weight which was a construction which I knew to be very old, I turned down his offer and refused to purchase his application or the patent which he might obtain for this structure.

Peter Weber

Sworn to and subscribed before
me this 20th day of July, 1909.

(Seal)

Anne R. Lehman

NOTARY PUBLIC, STATE OF NEW JERSEY
COMMISSION EXPIRES, JUNE, 1913.

PATENT IN SUIT AND DEVICE ALLEGED
TO INFRINGE

The patent in suit is discussed in the affidavit both of complainant's and defendants' experts, and it is clearly shown by the affidavit of defendants' expert, Mr. Holden, and the extracts he has made from the file wrapper, that the supposed novelty therein disclosed and which led to the grant of the patent consisted in swiveling the stylus lever in the floating weight of a phonograph reproducer in such a manner that the horizontal axis upon which the stylus lever vibrates intersects a prolongation of the vertical axis of the swivel and that this feature of construction is set forth in each of the claims. When the application was first presented, claims were made broadly to a swivel mounting of the stylus lever in the weight. These claims were canceled in view of the English patent No. 17,103 of 1896, which discloses the precise structure of the patent in suit, except that the vertical axis of the swivel is offset from the horizontal axis of the stylus lever and when prolonged the vertical axis of the swivel does not intersect the horizontal axis upon which the stylus vibrates, and the patent was allowed with its present claims, limited to a structure in which the axis upon which the stylus lever vibrates is intersected by a prolongation of the axis of the swivel.

The "Combination K" reproducer used upon an Edison Fireside phonograph has been introduced in evidence by complainant and it is this device which complainant alleges infringes the Smith patent in suit. The most

cursory inspection of this device will show that in it the horizontal axis upon which the stylus lever vibrates does not intersect a prolongation of the swivel axis, but is offset therefrom. The distance between these two axes when considered apart from the structure and as a matter of absolute distance, is not great, and perhaps is not over $1/8$ to $3/16$ of an inch, but it must be remembered that a phonograph reproducer is a watch-maker's job, and that distances which, when considered by themselves and without relation to the other parts of the device would be very small, yet, may be relatively quite large. In the "combination K" reproducer, this offset is at least one-fourth of the entire effective length of the stylus lever and is more than one-half the length of the shorter arm of this lever, which is the distance between the horizontal axis of vibration and the stylus point which tracks the record. Complainant's expert in order to show infringement has been forced to say that the swivel axis and the stylus lever axis in the "combination K" reproducer substantially intersect. But he is in the wrong. So far from there being a substantial intersection, we submit that an inspection will demonstrate to the Court that there is, when the relative sizes of the other parts of the instrument are considered, which of course must necessarily be done, a very substantial offset between these two axis lines. It is this "combination K" reproducer, in which the swivel axis and the stylus lever axis are separated by at least half the length of one of the lever arms, which complainant charges to be an infringement of the claims of the

patent in suit. These claims having been limited to a construction in which the two axis lines which we have mentioned intersect, and this limitation having been made in view of a patent in which the two axis lines were offset from one another, it is perfectly apparent that the claims of the patent cover only such a structure as is shown by the figures in the drawings thereof in which the two axis lines named intersect and cannot be construed or broadened to cover a structure in which these two axis lines are offset from one another. At any rate, such a construction or broadening of its claims is fatal to the patent, as the English patent shows the offset swivel.

So far we have considered only the structure of these three devices; the patent in suit, the English patent No. 17,103 of 1896, and the "combination K" reproducer alleged to infringe, without any reference to the principle of operation thereof. It is very conclusively shown by the affidavits of Messrs. Edison, Gall and Pierman filed on behalf of defendants, that in addition to the differences of structure to which attention has been called, there is a difference in principle between the operation of a reproducer in which the axes are offset, from that in which the axes intersect as is the case in the patent in suit, and that the former is much superior to the latter. Mr. Edison has brought out these differences very clearly in his affidavit, and has filed a sketch which clearly illustrates their different principles of operation. As he points out, when the axis lines in question intersect, the amount of rotation of the swivel member to produce a given

lateral deviation of the stylus is a maximum, and when the swivel axis is moved away or offset from the lever axis, there is a corresponding decrease in the amount of rotation of the swivel member necessary to produce the same amount of lateral deviation in the stylus. It will be seen, therefore, that this "combination K" reproducer with its offset axis lines which are taken from the English patent referred to, not only does not infringe the patent in suit, but produces a better, more delicate structure and one operating on an improved and different principle from that of the patent in suit, and that instead of the Smith patent in suit being for an improvement over the English patent which was cited against it, it is a step backward in the art.

OTHER ANTICIPATIONS AND PRIOR USES

We believe that the foregoing considerations absolutely dispose of this motion. But there is even more to be said against this patent.

It is anticipated by Edison patent No. 430,278, which shows an equivalent universal mounting for the stylus lever; patents Nos. 659,735 and 659,739, also show swivelled reproducer stylus levers.

The precise device of the patent in suit, even to the intersection of the swivel and stylus lever axis lines, was made, completed and reduced to practice on two different occasions long before Smith even thought of it. The affidavits of Edison, Fred Ott and John Ott, show that such a device was made by Mr. Edison in 1888 or 1889 and those of Gall, Morris and Hekel establish the making of a phonograph reproducer embodying these features, in 1901.

The only reason that these reproducers were not adopted and put into general use was that they represented unnecessary refinements for the one hundred thread record. Later when the more delicate two hundred thread record was produced, this refinement of the reproducer structure was put into use, but Smith and his patent had absolutely nothing to do with it; the contribution to the art had long been made when he entered the field, only the occasion for its use had not arisen.

Duplicating Machines

The structures made in 1886 or 1889 by Edison and by Gall in 1901, were reproducers. This problem of giving lateral play to the reproducer stylus was by no means a new one in 1907 when Smith applied for his patent, for not only did the English patent No. 17,103 of 1886 and Edison patent No. 430,278 point out the problem and its solution, but the same problem had likewise been presented and solved in connection with mechanical duplicating machines. It was desirable that a reproducer stylus be given lateral play because otherwise it might occasionally skip a groove or two of the record in reproducing, but it was absolutely essential in a machine for making a mechanical transference of a record groove to a blank cylinder that the reproducer should never skip a groove, as the new record would be spoiled and could never be used to reproduce from correctly. For this reason, practically all duplicating machines have been made with swiveled reproducer stylus bars and in practically every case the axis lines

of the swivel and of the stylus lever have intersected. Several such devices and sketches of others are in evidence and these machines were used to manufacture many thousands of duplicate engraved records which were sold to the public. The patent to Capps, No. 836,089 shows such a device. The affidavits of Walter H. Miller, Fred Ott, John Ott and Mrs. Devonald prove the use of a duplicating machine at Silver Lake in 1892 having a stylus lever swiveled in a floating weight in precisely the fashion of the Smith patent and connected to a diaphragm so that it was a phonograph reproducer as well as a duplicating machine. This use is a flat anticipation of this Smith patent, including the feature of intersecting axis lines.

The history leading up to complainant's alleged acquisition of the patent in suit is set forth in the affidavit of William Pelser. Passing without particular remark the fact that the proofs of complainant's title are more than meagre, the complainant appears to feel that the special circumstances which may sometimes justify the granting of a preliminary injunction on a green, unadjudicated patent are to be found in the fact that the National Phonograph Company negotiated for the purchase of the patent in suit. The partial story of Powers and Henkel who have made affidavits on behalf of complainant, has been completed by Pelser's affidavit, bringing out the history of the breach of confidence and misrepresentation of fact indulged in by Messrs. Powers and Henkel in the conduct of the negotiations looking to the sale of this patent.

Inasmuch as the patent has never been adjudicated, is invalid, is not infringed, and in construing it to support the infringement charge, complainant substantially admits its anticipation by the English patent of 1896, complainant is believed to be correct in the idea that some very special circumstances must be shown upon which to predicate the grant of a preliminary injunction, but we very much doubt whether these circumstances are to be found in the method in which complainant acquired the patent in suit as a result, first, of improper use by unscrupulous schemers of the confidential communication of the National Phonograph Company, and second, of an effort to hold up the National Phonograph Company in the name of the inventor, but really for the benefit of the designing schemers. Special equities, such as would justify the granting of a preliminary injunction, have no existence in this case.

It is a well recognized principle that a preliminary injunction will be refused where there are circumstances which raise a doubt. It would seem that a case would never be brought on for preliminary injunction where more doubts as to complainant's rights to relief existed, than have already been pointed out, but in addition to all the matters already discussed, it is shown by the affidavits of Gall and Weber that the patentee Smith was engaged at the Orange plant about 1902 and was located in a room which had been occupied shortly before by Gall, and that the latter had left in this room the swivel reproducer made by him in 1901, and of which the construction patented by Smith is almost a Chinese copy. Weber says that Smith

exhibited an inquisitive disposition and had access to whatever was left by Gall. Of course Smith himself is the only person who knows whether he saw Gall's 1901 reproducer there, but we submit that under the circumstances which have been shown to have existed relative to Smith's employment about 1902, even in the absence of any other defense, a preliminary injunction should not be granted.

In view of the foregoing, we respectfully and confidently ask that the motion for a preliminary injunction be denied.

Of Counsel.

**Legal Department Records
Phonograph - Case Files**

American Graphophone Company v. Cleveland Walcutt et al.

This folder contains material pertaining to one of several suits brought by the American Graphophone Co. against Cleveland Walcutt and his associates in the U. S. Circuit Court for the Southern District of New York. The case was initiated in 1894 and involved U.S. Patents 341,214, 341,288, and 341,287 issued to Chichester A. Bell and Charles S. Tainter. Similar cases were initiated in 1897 and 1898. The selected items consist of the index and affidavits by Edison, George E. Tewksbury, and Cleveland Walcutt from a volume entitled *Defendants' Papers in Opposition to Motion for Preliminary Injunction*.

BOX No. 6 *12*

Legal Box 34
Folder 23

United States Circuit Court,
SOUTHERN DISTRICT OF NEW YORK.

IN EQUITY.

AMERICAN GRAPHOPHONE CO.

vs.

CLEVELAND WALCUTT ET AL.

Defendants' Papers in Opposition to Motion
for Preliminary Injunction.

DYER & SEELY,

Solicitors for Defendants.

RICHARD N. DYER,
SAMUEL O. EDMONDS,

Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

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(The following patents are bound in the end of the record in the following order:)

English Patents:
3909 of 1877 to Thomas A. Edison.
1644 " 1878 " " "

United States Patents:
C. C. Reynolds, 287,106.
T. A. Edison, 393,492.
" " 393,567.
" " 393,568.
" " 400,640.
" " 414,701.
" " 430,374.
" " 430,278.
" " 484,583.

United States Circuit Court,
SOUTHERN DISTRICT OF NEW YORK.

AMERICAN GRAPHOPHONE COMPANY

vs.

In Equity.

CLEVELAND WALCOTT ET AL.

Affidavit of Thomas A. Edison.

STATE OF NEW JERSEY, } ss:
County of Essex.

THOMAS A. EDISON, being duly sworn, deposes and says:

I have read the affidavits of the complainant for use on the motion for preliminary injunction, and believe that they fail to present a correct view of the situation. So far as I know, there has never been any recognition of the validity of the graphophone patents on which this suit was brought, nor has it ever been recognized that the matters set forth in those patents involve inventions of merit.

The attempt is made by these patents to cover the idea of producing the phonograph record by cutting in a solid substance, and particularly by cutting the record in a wax or wax-like material, which is stated in the patents to be a mixture of beeswax and paraffine. It is asserted that this feature made possible or created the modern phonograph. But that is not the fact. Aside from details in the construction of the machines, making them more convenient in use, which details are not employed in the phonograph, the machines described in these graphophone patents involve no advance in the art.

At the time of my original work upon the phonograph in 1877 and 1878, I used for the recording surface, not only tinfoil, which was pressed into a groove by the recording point, but I used various solid resisting materials in which the records were cut by the recording point. Among these latter materials were various waxes, including beeswax and paraffine and mixtures of the same, and also various metals and compositions and alloys of metals. My tinfoil phonograph, however, proved to be the best at that time for the particular use which was made of it, namely, for a loud-sounding instrument which could be used for exhibition purposes without listening tubes. I not only used these solid resisting materials to form the record, but I used with them suitable sharp recording points—chisel-shape, knife-edge and otherwise—by which the materials were cut. The fact that I used such materials for the recording surface, and that in recording upon them the record was formed by the removal of the material, is shown by statements in my early patents and caveats. In my English Patent No. 1614 of 1878, a copy of which is appended, the statement is made that the recording surface may be formed by coating paper or other materials with paraffine or other hygroscopous, waxes, gums or lac, and that this may be used itself to form the record, or that it may be covered by a sheet of thin metal foil. The fact that when I used the sheet without the metal foil, the wax was actually removed in the process of producing a record (as it must be, in fact, when the material is free), is shown by the statement in the patent that, when the foil is placed over the wax, "the indenting point does not become clogged with the paraffine in consequence of the intervening foil." Similar statements appear in patents taken by me at about the same time in other countries, and also in various publications made about the same time, referring to my work and to my patents. The paraffine coating took the place when superimposed by the tinfoil of the grooved surface into which the tinfoil was

pressed by the recording stylus when the foil was used alone, and consequently a sufficient body of paraffine was placed on the paper for that purpose. This is indicated by the statement in the English Patent that, in recording on the foil laid on paraffine, "the indentation can now be made in the foil and the paraffine." Hence there was a sufficient thickness of paraffine to receive the whole depth of the record, and when used without the covering of metal foil the record was made by plunging a groove in the paraffine of greater or less depth, according to the movements of the recording style. The word "indentation" was used by me as descriptive of the waves of the resultant record, and not as indicative of the method of recording.

The use of wax and waxlike materials for receiving phonograph records which are cut in producing the record, was also proposed by various other persons, in 1878 and 1879, including Lambrigt, Croes and Colonel. Lambrigt employed stearine, which is a waxlike material; Croes and Colonel employed wax. These materials are necessarily cut or removed in recording upon them, and that without reference to the shape of the point of the recording style, but as a matter of fact the form of the recording style employed by me, and also by the other experimenters to whom I have referred, was such as to make it certain that the material was entirely removed in producing the record, and not removed to one side only. It is not possible to throw the material which must be removed to form the indentations, on one side of the line of the record, except in cases where a very soft, viscous material is used. In the case of the record cylinders at present employed with the phonograph, no record can be made that does not entirely remove the material, and that without regard to the form of the recording point, since any form of recording point that can be made to record at all will remove the material entirely, the only difference being that the power required in the case of a dull point is greater than with a sharp point. The knife

18 edge recording style is described in my first English patent No. 2804 of 1877 (copy appended).

The United States patent of Christopher C. Reynolds, granted October 23, 1883 (copy appended), is also significant in this respect. Reynolds, considering the tinfoil record of the ordinary phonograph not durable and not capable of being handled, proposed a phonograph operating to cut the record in hard materials. The special materials he mentions are certain metals, but he says, "These strips may be made of any

14 of the metals heretofore mentioned, or any durable material which will withstand the frictional wear and handling incident to their use." In order to secure the power necessary for cutting the record into hard materials while retaining a sensitive action of the recording diaphragm, he proposes to utilize the movement of the recording diaphragm to vibrate the recording surface against a cutter rotated by power, which cutter cuts the record.

In my early experiments, as set out in my English 15 patents of 1877 and 1878, I appreciated the desirability of a record in metals and other hard materials, and many methods of producing such records are described by these patents. I also set forth, among other plans of making records, the two plans (1) of causing the vibrations of the recording diaphragm to move the insulating point directly, and (2) of causing such vibrations to control and direct a force of greater energy which would itself produce the record. Thus in figure 4 of my first English patent, a half-edge re-

16 cording style forms the record directly, while in figures 14 and 15 of that patent, the recording diaphragm gives form to a thread which by means of power rollers is pressed into the surface on which the record is made. In my second English patent, most of the forms of recorder act directly upon the recording surface, but in figure 50 the recording diaphragm is used to move a valve controlling a blast of air, which works with greater force upon a second diaphragm carrying the recording

style. Hence, before this patent of Reynolds not only 17 had metals, waxes and other materials been suggested as the recording surface, but it had also been suggested that the sound vibrations could be used to produce the record directly or to control more energetic means for producing that record. Reynolds adopted the second plan of making the record and developed a special machine in which the record surface would be moved with relation to a rotary cutter, the record being cut in solid material, for which purpose he prefers the metals, but mentions any other hard material. The grapho- 18 phone patents in suit simply adopt the other old method of recording, namely, the operation of the recording style directly by the diaphragm, and apply that to the cutting of one of the old materials already known for the purpose. The form of cutter proposed by Reynolds which is not provided with teeth receives no advantage from the fact that it is arranged to rotate, and it might as well be stationary. With his smooth 19 edge cutter, therefore, Reynolds simply moves the record against the cutter instead of moving the cutter against the record as is ordinarily done. The distinctions which the first of the two patents in suit attempts to draw over this Reynolds patent are not, it seems to me, valid distinctions, in view of what I had already disclosed by my patents.

The difficulty I had in the use of wax as a recording surface in 1877 and 1878 was that the point became 20 clogged, as stated in my English patent of 1878. This was due to the softness of the wax employed. The mixture of beeswax and paraffine referred to in the patents in suit is subject to this same objection, and the graphophones which were first put upon the market employed a soft wax, such as is described in the patents in suit, and were highly objectionable for this and other reasons, and were not in any sense practical or commercial machines. The difficulty arising from clogging is recognized by the patents in suit, and in the second patent in suit the machine is provided with a brush which is designed to overcome this difficulty.

6

21 After 1878 I continued my experiments upon the phonograph to such an extent as my work in other directions permitted, and I used from time to time waxes and other forms of solid recording surfaces in which the record was cut. These experiments were almost constantly under way, in one form or another. The experiments which resulted in the perfected phonograph of to-day were begun as early as 1882.

The inference contained in the moving affidavits, that I did not renew my experiments upon this subject until I heard of the graphophone, is not in accordance with the facts. It is probably true that when I learned of the graphophone I gave more time to the experiments on the phonograph and prosecuted them with greater vigor than I would otherwise have done, but I had then for some time been conducting experiments looking towards bringing out a commercial form of the phonograph, and had been using, among other things, waxes and compositions of waxes for the recording surface.

23 When the graphophone was placed upon the market, it was not a successful or commercial machine. The phonograph, which was placed upon the market at the same time, was a better machine than the graphophone, but was not, in my opinion, a commercial or successful machine. I had invested a considerable amount of money in the manufacture of the phonograph, and was under contract to deliver commercial machines, and after expending a large sum of money in the manufacture of phonographs, it became evident that although the phonograph was better than the graphophone then upon the market, neither was a commercial machine, and the amount of money invested by myself and others in the business caused me to undertake an elaborate series of experiments to produce such a machine.

24 The principal difficulty with both the graphophone and the phonograph at that time was the failure to reproduce the hissing and labial sounds, which failure rendered the machines practically useless for commercial pur-

7

poses because of the indistinct or unintelligible character of the record produced. I had experienced this same difficulty with the use of waxes in my early experiments, but I did not know the reason for the difficulty, and I had expected to overcome it by improvements in the mechanism of the machine. When, however, both the graphophone and phonograph proved to be commercial failures, I undertook the elaborate series of experiments referred to with a view of improving the phonograph and making it commercial. The real cause of the difficulty was not at that time known, 25 either to myself or to anybody else, so far as I am aware. I conducted the experiments by modifying and improving the various details of the machine, and especially of the recording and reproducing devices and the parts immediately connected therewith. In the course of these experiments I also attempted to eliminate the scratching and other foreign sounds which were apparent in the reproduction of the records. I hoped by the elimination of these foreign sounds to better reproduce the sibilant sounds, and hence make the articulation clearer, and perhaps to reach the real trouble. In this line of experiments I tried and used hundreds of mixtures of waxes and waxlike materials, keeping several men constantly employed in preparing the compositions and molding the cylinders under my direction. The cylinders were tried by me personally in most instances on the machines. For nearly a year I carried on this line of experiments, confining myself largely to the recording and reproduction of certain critical words like "ship" and "sugar." Towards the 26 end of the experiments I made some excessively hard wax compositions, much harder than anything which had been before tried, and I was much surprised, on trying them, to discover that the hissing and labial sounds were more clearly reproduced. I knew then that I had at last found the right principle, and that the perfection in articulation was largely, if not wholly, a function of the recording surface, i. e., the quality of the material, and not of the mechanism. I soon learned by microscope 28

20 and other investigation the correct theory upon the subject, which is that with soft materials the minute elevations and depressions which represent the hissing and labial sounds have not sufficient strength to operate the reproducing diaphragm, but are smoothed out by the reproducing style, and that to give such minute elevations and depressions sufficient resisting power for that purpose an excessively hard material must be employed. And further that the material must be brittle and not viscous to prevent the distortion of the record.

30 Having reached that conclusion and demonstrated its accuracy to my satisfaction, I proceeded in my search for still harder materials, and finally adopted soap, which is covered by my patent No. 430,374 (copy appended), and that material has remained to the present day the recording material for the phonograph.

Recently the Graphophone Company has greatly improved the graphophone by the use, either of cylinders made by the Edison Phonograph Works for the 31 phonograph, the graphophones being provided with special tapering mandrels to receive them, or of cylinders made by the Graphophone Company in imitation of the phonograph cylinders and composed of an exceedingly hard material which I believe to be principally soap, such as is covered by my patent No. 430,374; and notwithstanding the fact that by its construction the Graphophone Company obligated itself not to use any of the improvements upon the phonograph, or to alter the graphophones in the direction of utilizing any of the features of the phonograph, yet that company has been 32 obliged, in order to make the graphophone at all commercial, to not only adopt the hard soap cylinders of the phonograph, but to adopt other features of the phonograph, such as the true cutting style of my patents Nos. 393,967 and 393,968, the sapphire recorder of my patent No. 484,685, the cup-shaped recording style and spherical reproducing style of my patent No. 430,378, the microscope glass diaphragm of

my patent No. 400,646 (copies appended) and other 33 devices invented and patented by me.

While the metallic soap, which is the recording material of the phonograph, is in a sense a waxlike material, yet due to the facts which I have stated, it clearly is not the scientific or practical equivalent of the composition of beeswax and paraffine referred to in the patents in suit.

The phonograph cylinders are not only made of soap, as stated in my patent No. 430,374, but they are also molded in one solid piece of that material, as 34 stated in my patent No. 393,492 (copy appended), the material not being coated upon a foundation of paper or other similar material, and the special form of cylinder which I finally adopted is that having an internal rib in accordance with my patent No. 414,761 (copy appended). The features of these patents Nos. 393,492 and 414,761 are also used in record cylinders which have been recently introduced for use with the graphophone.

The use of a cylinder made wholly of a wax-like material is significant of the character of the cylinder, because when cylinders are made as described in the graphophone patents here in suit, by coating a paper tube with a wax surface, the wax must be soft, viscous and flexible; otherwise, when it cools after the coating is applied, it will crack, due to contraction, and it will also crack subsequently by expansion and contraction due to variations in temperature, because the coefficient of the expansion of wax is many times that of a material such as paper. 36 I found, however, in my experiments that any waxlike material which is sufficiently hard to produce a successful phonographic record, cannot be coated upon paper or similar material, but must have substantially the same co-efficient of expansion throughout the cylinder in order to prevent cracking the material. This, although I did not know the reason at the time, was one of the difficulties I met with in my early experiments, the waxes I employed being coated upon a paper or similar backing

87 in most, if not in all, instances. The same difficulty is inherent in the cylinders which are described in the graphophone patents in suit. The use of a paper foundation makes it necessary that the wax coating be thin and relatively soft and flexible, in order to withstand the difference in the rate of expansion of the wax and the paper, and such is the coating described in those patents. Hard rubber has a rate of expansion several times greater than paper, and yet the hard wax-like materials which can be successfully employed cannot be moulded upon it without cracking, since they have a still greater rate of expansion. The phonograph cylinders now in use, being made wholly of soap, are not destroyed by any change in temperature.

88 With regard to the recording tablet which is made the subject of the second graphophone patent here in suit, I wish to call attention to the fact that the phonograph cylinders are made of a soap, and are not cast, as does the tablet in the graphophone patent, of a hollow cylinder or tube of paper or other similar material upon which wax is coated, nor is the surface one made of a mixture of beeswax and paraffine. I wish also to call attention to the fact that various forms of recording surfaces, including rollers and cylinders, are described in my early patents, my English patent of 1878 stating that "the phonogram may be in the form of a disk, a sheet, an endless belt, a cylinder, a roller or a belt or strip."

89 A sample phonograph cylinder is submitted herewith; also a sample graphophone cylinder with the 40 coating on a paper tube; and also a sample graphophone cylinder made wholly of a hard waxlike material, which is hard soap, with internal ribs. The paper tube, with which this last cylinder is provided, is put into the cylinder after the latter is made. It performs no useful function, and is, in my opinion, used only to conceal the real character of the cylinder.

The failure of the graphophones of the patents in suit is further shown by the following facts: The graphophone and phonograph were introduced upon the

41 market by the North American Phonograph Company simultaneously and under contracts providing that customers should be allowed to select either machine. In this way a considerable number of phonographs and graphophones were introduced, but the graphophone began to be immediately thrown back upon the hands of the North American Phonograph Company until they were nearly, if not quite, all replaced by phonographs, and the North American Phonograph Company found it impossible to introduce the graphophone. 42 Under Mr. Lippincott's contracts with the Graphophone Company he bought a large number of graphophones, some three thousand as I now remember, and paid the Graphophone Company upwards of two hundred thousand dollars for the machines, but they were so worthless that these machines were eventually all shipped to the Edison Phonograph Works and were there thrown into scrap.

Another proof of the failure of the graphophones is furnished by the experience of the International Graphophone Company. That company purchased the graphophone patents for England and other foreign countries, and undertook to do business with the machine described in those patents. Under a misunderstanding as to the practical character of the graphophones the International Company paid, as I have always understood, a large amount of money for the patent rights. It established a factory in this country, and began here the manufacture of graphophones for the foreign market. The business, however, was a failure. At that time I was exhibiting through agents the phonograph in European cities, and, in order to save the loss of their entire investment, the International Company opened negotiations with me for rights under the phonograph patents. As a result of the negotiations a new company called the Edison United Phonograph Company was formed, one-half of the capital stock of the United Company was paid for rights in the phonograph, the capital stock of the International Company being bought with the 44

45 other half, the factory already established in this country was given up, several hundred graphophones which had been manufactured, or partially manufactured, were sent to the Edison Phonograph Works at Orange, N. J., and there turned into scrap, involving a loss of many thousand dollars, and the United Company began to use phonographs manufactured by the Edison Phonograph Works, and has continued to use such phonographs exclusively down to the present time.

With regard to the arrangements with Mr. Lippincott which are set up in the moving papers as constituting an acknowledgment of the validity of the graphophone patents, and of the merit and originality of the alleged inventions covered by said patents, I do not think that such arrangements furnish any warrant for the conclusion which is sought to be drawn from them.

Mr. Lippincott was interested in the graphophone and had the exclusive right to exploit it. At the time he acquired those rights he did not know of any perfected phonograph, but soon after that time, I having opened

47 an office in New York City for the sale of machines, he saw my machine, and, recognizing its superiority over the graphophone, he desired to acquire the right to handle it.

I had already made arrangements for the exploitation of the phonograph when Mr. Lippincott opened negotiations with me. He was obliged to secure the consent of the Graphophone Company on account of his contract obligations, and in his endeavor to secure a release from those contract obligations, he undertook to pay the Graphophone Company ten dollars a machine

48 upon each phonograph which he put into active use. I have always asserted and believed that the graphophone patents were invalid so far as they pretended to cover the features of the phonograph, and my understanding of Mr. Lippincott's negotiations with the Graphophone Company was that his arrangement to pay a royalty on the phonographs was purely a business compromise and had no relation to any question of the validity of the graphophone patents or of the infringement of such patents by the

phonograph. It is my understanding, however, that all phonographs at the present time on the market and in the hands of users are machines upon which Mr. Lippincott has either actually paid royalties or which have been or should have been included in royalty accounts rendered by the Graphophone Company against Mr. Lippincott before the date of his assignment.

Further than this, all phonographs and all phonograph supplies now on the market were manufactured and sold by the Edison Phonograph Works in accordance with contracts by which the complainant the American Graphophone Company acknowledged the right of the Edison Phonograph Works to manufacture and sell such instruments and supplies.

The contract situation is a complicated one, and involves many documents as well as many agreements, evidenced by the course of business in which the American Graphophone Company acquiesced and from which it profited. On August 1, 1888, an agreement was entered into between myself, the North American Phonograph Company and Jesse H. Lippincott, a copy of which is hereto annexed, in which my right to manufacture phonograph and phonograph supplies is acknowledged, and in which it is provided that the phonograph and the graphophone (the latter called the "phonograph-graphophone"), which were to be put upon the market by the North American Phonograph Company, should not be changed from standard models to which the agreement refers by the incorporation in either instrument of any of the features of the other in such respect as they then differed, and that in the future, while I might improve the phonograph and the manufacturer of the graphophone might improve that instrument, yet that neither should use the improvements of the other, and that "no new patented invention of the said Edison, assigned or assignable to the Company hereunder, shall be used on or sold with the phonograph-graphophone, and no new patented invention owned or controlled now or hereafter by the Yalta

53 Graphophone Company shall be used upon or sold with the said phonograph." In other words, neither interest was to use the then patented or subsequently patented inventions of the other interest, except so far as they were then in use in the standard models to which the agreement refers. My interest in this contract was transferred to and operated under by the Edison Phonograph Works.

The standard phonograph which said contract refers to contained all the features of all subsequent phonographs, so far as there is or can be any claim of infringement under the graphophone patents here in suit. The phonograph has been changed from the model referred to in said contract only in strict compliance with the terms of the contract, by modifications which were inventions of my own, and which were not at the date of said contract, and have not since that time been patented by the graphophone interests. The standard graphophone referred to in said contract infringed several of my 54 patents, and especially my early patents upon the phonograph granted in 1878 and 1880. The graphophone subsequently manufactured, however, have not been made in compliance with said contract, but have been modified by the use of inventions patented later by me.

This contract of August 1, 1888, was acknowledged and confirmed by the American Graphophone Company, as evidenced by the course of business, and also by an agreement between the Graphophone Company and Mr. Lippincott, dated August 5, 1889 (copy appended), the purpose of which was to ratify the various arrangements which Mr. Lippincott had already made, including the arrangements made by said contract of August 1, 1888.

The situation was investigated by Mr. Benjamin F. Tharston in the opinion which is referred to in the affidavit of Charles J. Bell given for the complainant in this case. Mr. Tharston summarizes the situation in the following language.

"The substance of the agreements with respect to the phonograph and the graphophone, so far as relates to the rights of the North American Phonograph Company, may be summarized as follows: The title to the Edison phonograph patents resides in the Edison Phonograph Company. The title to the graphophone patents resides in the Volta Graphophone Company. The exclusive right to manufacture Edison phonographs under these patents resides in the Edison Phonograph Works. The exclusive right to manufacture graphophones is vested in the American Graphophone Company. The exclusive right to use, lease and sell both the phonograph and the graphophone is vested in the North American Phonograph Company. The continuance of these rights depends upon the performance of the conditions of the several agreements upon which these rights are based. I have not felt it necessary to go through in detail these several agreements beyond stating their general effect."

"The Edison Phonograph Works," which Mr. Tharston refers to, is a corporation, a majority of whose capital stock is owned by me. The Edison Phonograph Company, referred to by Mr. Tharston, is likewise a corporation, and all of its capital stock is now owned by me. I have acquired the capital stock of the latter company by purchase since the North American Phonograph Company went into the hands of a receiver in August last. The ownership of my patents relating to phonographs and the right to manufacture under said patents, except so far as said right is affected by the contracts made with Mr. Lippincott, the North American Phonograph Company and others, are now practically my personal property.

In conclusion, I wish to say that neither the phonograph nor the graphophone is, even to-day, notwithstanding the use in both of those instruments of inventions which I have made since they were put upon the market in 1888, a satisfactory commercial instrument for the use which the North American Phonograph Company expected to make of

61 those instruments, and upon which its large capitalization was based. That use was the replacement of the stenographer in commercial houses, in the work of professional men and the like. With both of these instruments the amount of matter which can be placed upon one record cylinder is limited to a running time of a few minutes. Further, and more important, is the fact that even with the approximately perfect articulation which I have succeeded in obtaining in the phonograph, the sounds are weak, and listening ear-tubes have to be employed.

62 There are also numerous other defects which must be remedied. For these reasons the effort to introduce the most perfected phonographs for use by commercial and professional men for dictation purposes has been practically abandoned, and the present use of such instruments is almost wholly for amusement purposes in the reproduction of musical and other records.

In 1877 and 1878, I believed that an instrument which would give a loud reproduction, audible throughout a room, was essential to thorough success, and I still believe so. The limited extent to which the phonograph has been introduced is largely due to the adoption of the business idea that an instrument which would have to be listened to with ear-tubes would have a certain extent of use. Had I cared to take advantage of that limited field in 1878, some of the instruments I then had would have been quite as satisfactory as were the first phonographs and

64 looking for a broader field—for that great and unquestionable success which when attained will make the phonograph one of the most useful and valuable of modern appliances. But that success has not yet been attained. I am, however, working in that direction, with every prospect of an early and favorable issue to my experiments, and I expect soon to put upon the market an instrument with which novels, plays and the finest classes of instrumental and vocal music can be rendered audible in a room, and which will give, when the

records are reproduced, the same quality and approximately the same volume of sound as the original rendition.

THOMAS A. EDISON.

Subscribed and sworn to before me this 6th day of December, 1894.

T. H. SMITH,
Edison, N. J.,
Notary Public,
State of New Jersey.

[SEAL.]

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.

AMERICAN GRAPHOPHONE COMPANY

vs.

In Equity.

CLEVELAND WALCUTT ET AL.,

Affidavit of George E. Tewksbury.

STATE OF NEW YORK, } ss:
County of New York, }

GEORGE E. TEWKSBURY, being duly sworn, deposes and says as follows: I am thirty-six years of age, reside at Newark, N. J., and am the secretary and treasurer of the United States Phonograph Company, whose place of business is located at Newark, N. J. The principal business of the company consists in providing the blank record cylinders of talking machines with musical and other records for exhibition purposes, and supplying such records to sellers and users of phonographs and graphophones. It has a larger business of this character than any other concern. It also deals in talking machines and supplies therefor to a limited extent, but has never manufactured either the instruments themselves or the supplies which go with them. 107

I have been connected with the talking machine business since the inception of the commercial business in 1888, and am well acquainted with the history of that business. I was interested in the Kansas Phonograph Company at the time of its organization in 1888, and conducted the negotiations which resulted in a license 108

109 to that company, under the patents here in suit, by the North American Phonograph Company, such license being dated November 15, 1888. Prior to that date, I spent considerable time in New York City, conducting the negotiations which resulted in that contract, and from as early as 1888, down to the signing of the Kansas contract, I was in frequent consultation with Mr. Jesse H. Lippincott and the various persons who were at that time interested in the talking machine business.

110 Prior to the organization of the North American Phonograph Company, which was in July, 1888, Mr. Lippincott had made a contract with the complainant, the American Graphophone Company, the owners of the graphophone patents including the patents in suit, by which, as was represented and generally understood, he became the agent of the complainant company, and the exclusive licensee under its patents. He subsequently, with the consent of the Graphophone Company, made contracts with the owners of the Edison phonograph patents, whereby the business of ex-

111 ploiting both the phonograph and the graphophone was to be carried forward as a single business. He organized the North American Phonograph Company for the purpose of exploiting said business, transferred his rights to that company, and organized various local companies, and licensed to them licenses by which they were given exclusive rights under the phonograph and graphophone patents, each in a limited territory. Up-

112 wards of thirty local companies were thus organized and licensed, with the knowledge and consent of the complainant the Graphophone Company. These local companies paid large amounts for their rights, in cash and stock, and the profits arising from the business thus organized were participated in by the complainant company. The Kansas Company, for illustration, owned the rights for the State of Kansas and the Territory of New Mexico, and paid therefor \$20,000 in cash and \$60,000 of its capital stock. Similar amounts were paid by other companies. The New Jersey Phonograph Company, which was licensed February

19, 1889, and had the exclusive rights for the State of 113 New Jersey, paid \$50,000 in cash and \$125,000 of its capital stock.

I attach hereto a copy of the license contract of the New Jersey Phonograph Company as showing the rights of that company, and as an example of the character of contract which the other local companies received.

These contracts were all made for a period of five years, with the privilege of extension, and were in all instances, so far as I am aware, extended to March 30, 114 1903, and are now in force. The licenses of the Kansas and New Jersey companies were, in fact, extended to the last-named date.

The business was first carried on by the local companies by renting the machines to users, but subsequently, and in accordance with the contracts, the local companies were given the right to sell machines and supplies to the public.

The phonographs now owned by the United States Phonograph Company and used by that company to 115 make musical records were purchased by the United States Phonograph Company from the New Jersey Phonograph Company, and are used by the former company with the knowledge and consent of the latter company in the territory which is covered by the contract between the latter company and the North American Phonograph Company. All phonographs which the United States Phonograph Company has ever purchased and sold, and all blank record cylinders which it has ever purchased and used or sold 116 have been purchased from one or the other of the local or sub-companies having licenses under the patents in suit similar to the license of the New Jersey Phonograph Company.

During the carrying on of the business of the United States Phonograph Company, Mr. Emerson and myself, as officers of that Company, have been brought into very frequent contact with Edward D. Easton, of Washington, who is the vice-president and general

117 manager of the American Graphophone Company, and
also president of the Columbia Phonograph Company,
which latter is one of the local companies which ac-
quired territorial rights from the North American Com-
pany, in the same manner as in the case of the Kansas
and New Jersey Companies. Said Easton is practi-
cally the manager of both said Graphophone Company
and said Columbia Company. He is largely interested
in both, and the interests of the two companies are un-
derstood to be practically identical. He has known of
118 the operations of the United States Phonograph
Company ever since its organization, has dealt with it
very largely in the purchase of phonograph records,
and never, until recently, has he seriously intimated or
suggested that our business was carried on without
proper authority, or that the machines licensed to be
used and sold by the New Jersey Company, and
which we obtained from that Company as stated, were
in violation of any rights held by the American Grapho-
phone Company, of which, as I have said, he is no officer;
119 or that the licensed use of said machines did not in-
clude the right and license to make, use and sell
musical and other records on blank cylinders,
which right constitutes the essentially useful element
of such machines.

On the contrary, for a long time past, said Easton
has very frequently visited our laboratory, and his two
companies, the American Company and the Columbia
Company, have been among our largest customers.
Said Easton has during this period aided and encour-
aged us by suggestions and in many other ways in the
120 carrying on of our business, and under such encourage-
ment we have established a very large trade.

It is untrue, as stated in the affidavit of Charles J.
Bell, verified October 9th, 1894, that the claims of nov-
elty, originality and merit in the graphophone patents
here in suit have never been seriously disputed. On
the contrary, I believe these subjects to have been
always in dispute; certainly this has been the case for
the last several years during which I have been con-

nected with this industry. Mr. Edison has been and is
regarded all over the world as having originated the only
commercially successful phonograph. This is generally
conceded and is regarded as beyond dispute. Until
a short time ago the American Graphophone Company
was utterly unable to place upon the market a grapho-
phone capable of accomplishing commercial and useful
results. The machine which they are at present put-
ting upon the market overcomes the difficulties hereto-
fore experienced only so far as it employs the practical
features of the phonograph which they have adapted to
the graphophones. This, as I have intimated above, is
the feeling prevalent among those connected with this
business, and the fact that the graphophone is incap-
able of practical commercial use is demonstrated by the
fact that at the present time there are comparatively
few graphophones in use, while phonographs in large
numbers have been sold all over the world.

Until very recently it has been conceded by the offi-
cers of the Graphophone Company that the grapho-
phone was not an operative and successful device. At 122
the Second Annual Convention of Local Phonograph
Companies of the United States, held in New York in
June, 1891, James G. Payne, then president of the
American Graphophone Company, was called upon for
an address to the Convention upon the subject of the
commercial sound recording and reproducing device,
and at the conclusion of this address, on being asked
by a member of the Convention as to whether or not
the Graphophone Company had a new machine or
were about to make such a machine, he replied as fol-
124 lows:

"I want to say on that point that we have quite a
number of graphophones at our factory and recognize
the justice of some of the complaints that have been
made about them, and are trying to improve them. We
have men at work at Bridgeport now, both on the
graphophone and on the cylinder, and if it becomes a
necessity for us to take the field, as it may possibly be,
we propose to have a machine that we can offer to

126 local companies or to agents with some assurance of success."

Although the phonograph has been upon the market for a number of years past, it has only been within the last year or so that the American Graphophone Company, by ascribing in its machines various features of the phonograph as aforesaid, has been able to place upon the market a device such as Col. Payne referred to as a machine that can be offered "to local companies or agents with some assurance of success." One of the

129 leading difficulties which precluded the successful operation of the graphophone prior to this time was that it employed a recording cylinder of soft, waxy material. This cylinder and the recording and reproducing styles used in connection therewith were incapable of performing their respective offices satisfactorily. Not only was it impossible to record and reproduce the hissing and lulling sounds, but said styles, which were constructed of steel, were rapidly worn down or dulled, and in addition were so injuriously affected by the moisture both in

127 the recording medium and in the atmosphere that within a very short time after they were put into use they became unserviceable, and the machine, therefore, utterly impractical for recording and reproducing music.

In the spring of 1893, recognizing the manifest advantages of the phonograph, the American Graphophone Company commenced employing in its machines cylinders made by the Edison Phonograph Works, and supplied, I understand, by the North American Phonograph Company to the Columbia Phonograph Company under its license. These cylinders were turned over to the American Graphophone Company by the Columbia Phonograph Company. At the same time the graphophones were provided with tapering mandrels adapted to receive phonograph cylinders, and all graphophones sold to-day, so far as I know, have such mandrels. After putting these Edison cylinders into use upon their graphophones, they made the corresponding changes in the recording and reproducing devices,

adapting such as had for some time been used in the 129 phonograph. It is true that for over a year last past, the American Graphophone Company has carried on experiments with a view to manufacturing a blank for the graphophone capable of the use to which the blank of the phonograph is put, but, so far as I am aware, they have not been successful. During my dealings, as an officer of the United States Company, with said Edward D. Easton and the American Graphophone Company, these cylinders have been regarded as incapable of practical use for making musical and other 130 exhibition records, for the reason that in the most approved form the action of the atmosphere upon the blanks was to cause a bluish-white incrustation or mold to appear upon the surface, which soon destroyed the perfection of the record. This difficulty with the Graphophone Company's cylinders has been recognized and conceded by said Company and its vice-president, Easton.

In the spring of the present year said Easton, acting for the Columbia Company and the American Graphophone Company, submitted a proposition to furnish us with one thousand of these objectionable cylinders, which were referred to as "blue blanks," with the understanding that we were to provide such blanks with suitable musical and other records and return them to him, allowing a certain sum for our work. After considerable negotiation, we finally accepted the proposition on the understanding prompted by our knowledge of the impracticable nature of the blanks that if such blanks proved a failure and would not properly perform 132 their office we should return them to the Columbia Company, which was to make the loss good. We thereupon proceeded with the work of providing these graphophone blanks with musical and other records, but found that they were a failure. On notifying Easton to this effect, he suggested that we allow them to stand for some time, having in view that they would improve with age. The following letter written on May 11th, 1894, by the United States Company to the

133 Columbia Phonograph Company illustrates our position in this connection:

"We are reluctantly compelled to cancel our arrangement with you in so far as it relates to the acceptance of Graphophone blanks in part payment. We will leave the price as we agreed, and we do not think that you can consistently ask us to accept a product which we know to be inferior and detrimental to our trade. We have now worked up all the blanks received from the Graphophone people, except the 11 returned 134 for your inspection.

"We appreciate your anxiety to put us right in this matter by your instructions that we should return all records made on Graphophone blanks not found satisfactory. We to-day ship you 140 orchestras. *We find the Graphophone blanks put across with age instead of bettering, and this of itself should indicate to you that there is something wrong in the composition or its preparation.*"

In acknowledgment of this letter, Mr. Easton wrote,

135 on May 12, 1894:

"Until further advised, we will, if agreeable, continue our record arrangement, giving you Edison blanks."

Thus, as late as May of the present year, the American Graphophone Company acknowledged its inability to devise a practical record blank for the graphophone.

As illustrating earlier efforts made to devise blanks equal to the Edison product, the American Graphophone Company, in 1893, obtained from us for the purpose of making these cylinders a quantity of what we termed "scrap wax," and which consisted of fragments of Edison cylinders which had been broken during the process of providing them with records. This "scrap wax" was forwarded by us to the Bridgeport factory of the said Graphophone Company, and there, I am informed and believe, was made up into new cylinders.

The inability of the American Graphophone Company to supply a practical and commercial blank for

use upon either the phonograph or graphophone continues to the present day. It is not even now capable of supplying the trade, and, therefore, to preclude the users of these machines from employing the Edison blanks would practically throw the whole talking machine enterprises to the ground.

GEORGE E. TEWKESBURY.

Subscribed and sworn to be:
from me this 6th day of
December, 1894.

ROBERT CORLIAN,

Notary Public,

Kings & N. Y. Counties.

[SEAL.]

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139

140

IN THE UNITED STATES CIRCUIT COURT, 249
SOUTHERN DISTRICT OF NEW YORK.

AMERICAN GRAPHOPHONE COMPANY

vs.

CLEVELAND WALCUTT ET AL.

In Equity.
No.

250

Affidavit of Cleveland Walcutt.

STATE OF NEW YORK, } ss.:
City and County of New York, }

CLEVELAND WALCUTT, being duly sworn, deposes and says: I am 32 years of age, reside in New York City, and am a member of the firm of Walcutt, Miller & Co. 251
dealers in talking machines and supplies therefor. I was associated with Mr. Jesse H. Lippincott prior to the organization of the North American Phonograph Company in July, 1888. At that time I became the head bookkeeper and cashier for that company, and subsequently became the secretary of the company, which latter position I held until the company went into the hands of a receiver, in August last. At that time I organized the firm of Walcutt, Miller & Co., and purchased and continued a certain department of the business of the North American Phonograph Co., in which business I am now engaged. 252

From the positions I occupied in the North American Phonograph Co., I am well acquainted with the general history of the business of that company, and particularly with the accounts which appear upon the books of that company. I established for the North American Phonograph Co. a system of keeping an account of the movements of all the machines owned by that

453 company, so as to show at all times where all the machines owned by the company were. That system of accounts I continued throughout my connection with the North American Company, and consequently I am well acquainted with the details of the business of that company in this respect. The course of business was as follows:

With respect to the phonograph, the Edison Phonograph Company manufactured the machines and shipped them on the order of the North American Phonograph Co., directly to the local companies which had been organized and to whom the machines were rented by the North American Phonograph Co. The Edison Phonograph Works continued to manufacture the phonograph and to bill the machines to the North American Phonograph Co. until a certain number of machines were so manufactured and billed. This number was reached January 1, 1890, after which time no further phonographs were billed to the North American Company, except a few machines of a different pattern from the regular machines, none of which, according to my recollection, were ever sold by the North American Company. The phonographs which had not been sent to local companies up to January 1, 1890, were held in stock by the Edison Phonograph Works subject to the orders of the North American Phonograph Co., and they were shipped out to local companies on rental from time to time as the North American Phonograph Co. so directed. The last of these shipments was made prior to February 1, 1891.

With regard to the graphophones, machines were ordered from the Graphophone Company through Mr. Lippincott, and were shipped to local companies as ordered.

The graphophones which are now in the hands of users in this country are the machines which were manufactured and billed to the North American Phonograph Co. prior to January 1, 1890, and which were all shipped to the local companies on rental prior to February 1, 1891. Mr. Lippincott was under

contract with the American Graphophone Company to pay that company a certain amount of money upon each phonograph which he sent out to the local companies. The course of business was for the American Graphophone Co. to periodically render accounts against Mr. Lippincott, including items for those royalties, upon the phonograph, and an account was kept on the books of the North American Phonograph Co., with the American Graphophone Co., showing the items and totals of the bills so rendered, and payments were made upon this account to the American Graphophone Company's order, and sometimes by Mr. Lippincott's check made to the order of the latter company. By an examination of this account on the books of the North American Phonograph Co., I find that the American Graphophone Co. was so paid \$385,674.90, of which amount \$42,705.53 was represented by notes of Mr. Lippincott, and the balance was paid in cash. On May 13, 1891, the American Graphophone Co. returned to Mr. Lippincott \$31,000.75 of the notes, by a letter stating that they had taken back in payment of the notes a certain number of graphophones. These machines had been billed, but had never been actually delivered.

On April 30, 1891, or within a few days of that date, the American Graphophone Co. rendered a bill against Mr. Lippincott, including an item of \$21.00 for phonograph royalties, and an item of \$472.55 for royalties on phonograph supplies. This account was rendered in response to a letter from Mr. Lippincott asking the American Graphophone Co. to render their account against him up to April 30, 1891, and the account was entered upon the books of the North American Phonograph Co., as a statement of the American Graphophone Company's account in full to April 30, 1891. Since, to my knowledge, all the phonographs had been sent out to the local com-

261 panies on rental by the North American Phonograph Co. prior to April 30, 1891, it thus appears from the books of the North American Phonograph Co., and is in accordance with my recollection, that the American Graphophone Co., at a later date than the shipment of any machines, recognized the authority of the North American Phonograph Co. to ship such machines, and asserted its claim against Mr. Lippincott for royalties on the machines so shipped. It is true that many of these phonographs were, in the course of the business

262 of leasing and releasing machines, returned to the North American Phonograph Co. Most of these returned machines were re-leased several times and finally sold either by the North American Company or by the Receiver of that company, and many were so re-leased and sold after April 30, 1891, but all of these machines were either included in the accounts rendered by the American Graphophone Co. on and prior to April 30, 1891, or should have been so included under the arrangements between that company and Mr. Lippincott.

263 263 Only one royalty was payable upon each machine, and that was payable when the machine was originally sent out.

All phonographs which were leased or sold were provided with devices both for recording speech, musical or other sounds, and for reproducing the same, and were also provided with blank cylinders upon which such records were to be made. The machines were designed for this purpose, and were leased or sold with the intention that they could be so used, both for re-

264 264 cording and reproducing. This was true of all the phonographs put out, with the exception of the autographs or slot machines, which were designed to be put in public places and operated by any person by putting a coin in the slot. These machines, of course, were only provided with reproducing devices, but were the same as the other machines in other respects, the recording devices and the knives for turning off the cylinder not being shipped with the machines.

The North American Phonograph Company was

organized by Mr. Lippincott for the purpose of exploit- 265
ing the business of leasing and selling both phono-
graphs and graphophones under the patents on both of
these machines, his rights under both sets of patents
being assigned to that company. Local or sub-
companies were organized in various parts of the
country, upwards of thirty in number, and to these
companies were given exclusive licenses under both
sets of patents (including the patents in suit) for lim-
ited territories. These licenses were all extended up
to March 26, 1903. I have read the contract of the 266
New Jersey Phonograph Company attached to the
affidavit of George E. Towlebury, given for the defend-
ants in this case. That contract is an example of the
contracts made by the North American Phonograph
Company with local or sub-companies. All such con-
tracts were substantially alike in their terms. The
New York Phonograph Company, hereinafter referred
to, received and operated under a contract of this same
character. At first the machines were shipped to the
local companies, and were to be had on lease, but
subsequently the local companies were authorized to
sell the machines. These business arrangements made
by Mr. Lippincott through the North American Phono-
graph Company were well known to the officers of the
American Graphophone Company, and the Ameri-
can Graphophone Company received a share of the
profits arising from the business so organized and con-
ducted.

267
In my relations to the phonograph and graphophone
business as employee and officer of the North American 268
Phonograph Company, I became acquainted with the
relative merits of the phonograph and graphophone as
they were put upon the market by the North American
Phonograph Company. The contracts with the sub-
companies required each of such companies to offer
both the phonograph and the graphophone to the
public "with absolute impartiality, leaving the person
or persons with whom it is dealing to make his or their
own selection," and further provided that the sub-

269 company, "its officers, agents and employees, shall in no way press the introduction of one instrument at the expense of the other." At first a great many machines of both types were shipped out, but the graphophones soon began to be returned, until practically all the graphophones which the company had shipped out were again upon its hands. These machines proved to be entirely uncommercial, and the company, finding it impossible to get users to take them, the machines were finally shipped to the Edison Phonograph Works, 270 where they now are, so far as I know. These graphophones which were so put out by the North American Phonograph Company and were returned to it as uncommercial, numbered some 3,000 machines, for which the North American Phonograph Company paid the American Graphophone Company, through Mr. Lippincott, upwards of \$200,000. Since the phonograph was the only machine which the public could be induced to use, it became necessary for the North American Phonograph Company to continue its business ex- 271 clusively with the phonograph, and its graphophones were shipped or put into use by the North American Phonograph Company after an early date in the history of its business.

The firm of Valcutt, Miller & Co., of which the defendants are members, was organized in the latter part of August, 1894, for the purpose principally of taking over and continuing the business of making musical and other phonograph records for exhibition purposes, which had been theretofore carried on by the North American Phonograph Company and subsequently by 272 North American Phonograph Company had conducted a separate department devoted to the making of musical considerable plant for that purpose at No. 130 East Miller, was in charge of that plant. The phonographs making, testing and exhibiting of the records, were ma-

chines which had been used for several years by the 273 North American Phonograph Company, and were a part of the machines which, as I have already stated, were shipped out to loan companies on rental prior to February 1, 1891, and had been returned to the North American Phonograph Company in the process of leasing, re-leasing and selling machines.

The North American Phonograph Company went into the hands of a Receiver August 21, 1894. A short time after that date, the firm of Valcutt, Miller & Co. entered into negotiations with the Receiver to purchase 274 the plant at No. 130 East Fourteenth street, and the supplies and records then on hand, with a view of continuing that department of the business, and on September 5, 1894, the sale of such plant to Valcutt, Miller & Co. was consummated by a bill of sale from the Receiver, given under the order of the Court, and since said last sale the business has been conducted by our firm. All the members of our firm were formerly connected with the North American Phonograph Company, and we have continued this branch of the 275 business of said North American Company, dealing with the former customers of that company.

The machines we use in our business are the identical machines which we thus purchased, and which had been used for the same purpose by the North American Phonograph Company and the Receiver for several years, and no others, and are and were machines upon which royalties were either actually paid to the American Graphophone Company by the North American Phonograph Company, or upon which such royalties 276 were payable, prior to February 1, 1891. At the time of making this purchase, there were included in the purchase a stock of blank phonograph cylinders, which we have used in making records, and since that date such cylinders as we have purchased have been purchased by us from the Receiver of the North American Phonograph Company. We have also sold a number of phonographs and some blank phonograph cylinders, as well as phonograph records, but all the phonographs

277 we have ever bought or sold were purchased by us from the Receiver of the North American Phonograph Company, and were machines of the class already referred to by me, namely, such as were originally sent out by the North American Phonograph Company prior to February 1, 1891, and upon which royalties were paid or payable prior to that date.

In our dealings with the Receiver of the North American Phonograph Company, said Receiver has not only acted on behalf of that company, but has also 278 acted on behalf of, and as agent for, the New York Phonograph Company, a company which is licensed under both the graphophone and phonograph patents and for the entire State of New York, including the City of New York. A copy of the contract creating the North American Phonograph Company the agent of the New York Phonograph Company is attached hereto and marked "Exhibit A," the same being dated July 1, 1892. That contract was operated under by the North American Phonograph Company, and subsequently by 279 the Receiver. I understand that the New York Phonograph Company attempted to cancel said contract in October or November, 1894, and subsequent to the sale of the plant by the Receiver to Walcott, Miller & Co., but that the Receiver has never assented to or recognized such cancellation and has continued since said date to do business under said contract by selling phonographs and supplies in the State and City of New York.

All the phonographs, parts of phonographs, blanks and records which have ever been purchased, used or sold by the defendants have been so purchased, used or sold with full authority from the Receiver of the North American Phonograph Company, acting not only under the rights of that company, but also under the rights secured by the contract of July 1, 1893, from the New York Phonograph Company.

The American Graphophone Company does not make musical and other exhibition records, which is the principal part of the business of our firm. Nor does

that company make and sell record blanks which are 281 suitable for that purpose, so far as I know. That company has never offered to sell us any record blanks; on the contrary, the Columbia Phonograph Company, which is understood to be practically the same interest as the American Graphophone Company, the two companies being managed by the same persons, has recently purchased from us three thousand blank record cylinders. This purchase was made by Mr. Easton, who is the active manager of both the American Graphophone Company and the Columbia Phonograph Company, and 282 Mr. Easton well understood that the blanks which he was purchasing were Edison phonograph blanks, purchased by us from the Receiver of the North American Phonograph Company.

I have read the affidavit of Mr. Easton, verified the 14th day of November, 1894, and was present at 120 East Fourteenth street on the day he called there. Said Easton was in my presence during the entire time that he remained at our place of business. Although sound records are made 283 by the firm of Walcott, Miller & Co., by processes known only to the members of that firm, the statement of said Easton in the said affidavit that he "observed the operations there carried on of making musical and other sound records," is untrue. No records were being made in the apartment where said Easton was, and if any were being made at the time they were being so made elsewhere and could not have been seen by said Easton. We do not admit persons to our operating rooms, other than those who are there employed, 284 and Mr. Easton, neither on the day referred to in his affidavit nor at any other time, has entered such rooms.

The firm of Walcott, Miller & Co. is composed of financially responsible persons. The plant and stock which we purchased from the Receiver of the North American Phonograph Company, and which we now have on hand, has a value of several thousand dollars, and we enjoy good credit in the trade. We occupy the

285 premises formerly occupied by the North American
 Phonograph Company at No. 120 East Fourteenth
 street, and pay an annual rental of \$2,000. The per-
 manent machinery used by us is securely attached to
 the building, and includes a steam engine and adjuncts,
 a dynamo, shafting, belts and permanent benches, and
 we are fully able and stand ready to respond to any
 judgment which may be rendered against us in this
 case.

CLEVELAND WALCUTT.

286 Subscribed and sworn to be-
 fore me this 10th day of
 December, 1904.

ROGER CONRAN,
 Notary Public,
 Kings and N. Y. Counties.

[SEAL.]

287

288

**Legal Department Records
Phonograph - Case Files**

***Columbia Phonograph Company v.
National Phonograph Company and William J. Rahley***

***Columbia Phonograph Company v. John E. Whitson and Walter J.
Whitson and the National Phonograph Company***

This folder contains material pertaining to two suits brought by the Columbia Phonograph Co. against the National Phonograph Co. and two of its agents, William J. Rahley of Baltimore and Whitson Brothers of Washington, D.C. The Rahley case was heard in the U.S. Circuit Court for the District of Maryland; the Whitson case, in the Supreme Court of the District of Columbia. Both cases were initiated in April 1901 and involved territorial sales rights. The selected items include the bill of complaint and a summary of docket entries for the Rahley case, along with correspondence regarding the progress of litigation in both suits. Among the documents not selected are briefs and other materials pertaining to the subsequent appeal of the Whitson verdict by the National Phonograph Co.

Copy for M.L.

IN THE CIRCUIT COURT OF THE UNITED STATES
For the District of Maryland.

COLUMBIA PHONOGRAPH COMPANY

VS.

IN EQUITY.

NATIONAL PHONOGRAPH COMPANY
and WILLIAM J. RAULEY,
individually and as agent
of said NATIONAL PHONOGRAPH
COMPANY.

TO THE HONORABLE THE JUDGES OF THE CIRCUIT COURT
OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

The COLUMBIA PHONOGRAPH COMPANY, a corporation created and existing under and by virtue of the laws of the State of West Virginia, and having its principal office in the City of Washington, District of Columbia, brings this its bill of complaint against the NATIONAL PHONOGRAPH COMPANY, a New Jersey corporation, and WILLIAM J. RAULEY individually and as agent of the said NATIONAL PHONOGRAPH COMPANY, a citizen of the State of Maryland, both of the said defendants having a regular and established place of business at No. 577 North Gay Street, Baltimore, Maryland, within the said District of Maryland.

And thereupon your orator complains and says:

-1-

That heretofore and by virtue of certain agreements in writing duly executed and delivered, and dated respectively Oct. 28, 1887, June 28, 1888, July 17, 1888, and Aug. 1, 1888, there were fully and completely vested in a New Jersey corporation known as the North American Phonograph Company, the entire title, ownership and control of, in and to certain phonograph inventions made by one Thomas

A. Edison, then and now of the State of New Jersey, and of, in and to all Letters-patent of the United States therofor already granted or that might be obtained thereafter for any phonograph invention produced by the said Edison within the fifteen years ensuing from the date last above mentioned,—as by reference to the several instruments above mentioned or duly authenticated copies thereof, here in court to be produced, will more fully and at large appear.

-3-

That thereafter, by an instrument in writing duly executed and delivered on June 15, 1899, the said North American Phonograph Company transferred and assigned to your orator the complete and exclusive right within the States of Maryland and Delaware and within the District of Columbia to use and let to others to use all phonographs and phonograph supplies, with further provision for conferring selling-rights also to your orator at some time in the future,—the duration of said exclusive rights thus granted to your orator being until March 26, 1905, and after that during the life of any such Edison phonograph patent to be obtained as aforesaid,—as by reference to said agreement or a duly authenticated copy thereof, here in court to be produced, will more fully and at large appear. And that thereafter, by action of said North American Phonograph Company taken on Dec. 3, 1899, the selling-rights above indicated were conferred upon your orator; and thereupon your orator by virtue of the premises became vested with the entire and exclusive right to use and let and sell and deal in phonographs and phonograph supplies throughout the territory aforesaid, to wit the

States of Maryland and Delaware and the District of Columbia, and until March 26, 1908, and after that until the expiration of all patents granted for phonograph inventions produced by said Edison prior to Aug. 1, 1898.

-3-

That all the conditions and acts required to be done and performed to vest in your orator its said exclusive rights and privileges under the various contracts and agreements aforesaid, have been duly executed and performed; and all considerations therefor have been fully and duly paid and carried out; and the exclusive rights of your orator within the territory aforesaid have always hitherto been recognized and acquiesced in by the public at large and especially by the said North American Phonograph Company and by the said National Phonograph Company (named as a defendant herein), its successor in the phonograph business, with the exception noted in the ensuing paragraph.

-4-

That, owing to the threatened invasion of your orator's said exclusive rights, your orator on March 9, 1898, filed its bill of complaint in the Supreme Court of the District of Columbia against said North American Phonograph Company and others, praying that the defendants in that suit be enjoined from directly or indirectly using or selling or dealing in phonographs or phonograph supplies within your orator's said exclusive territory; that an ex parte restraining order was granted against the said defendants; and that, after hearing both sides, on March 21, 1898, his Honor Judge COX handed down an opinion restraining to vacate said restraining order and sustaining your orator's said exclusive rights and ordering that an in-

junction issue; and that a perpetual injunction in conformity therewith was afterwards entered in the said cause and still remains in full force and effect,—as by reference to said bill of complaint and said opinion or duly authenticated copies thereof, here in court to be produced, will more fully and at large appear.

-5-

And your orator further shows upon information and belief that the said NATIONAL PHONOGRAPH COMPANY, named as a defendant herein, is successor in the phonograph business of the said North American Phonograph Company, and is bound by the contracts and agreements of the latter; that it is the sole and exclusive selling-agent for all phonographs and phonograph supplies manufactured in accordance with the said Edison phonograph inventions and under the said Edison phonograph patents; that all phonographs disposed of by said defendant bear a serial number and, together with all phonograph supplies put out by it, are furnished only to authorized dealers who are by said defendant required to sign a "dealer's contract" obligating themselves not to dispose of the same to persons not approved of by said defendant, or at prices other than those fixed by said defendant; and that the said defendant does not sell its said phonographs outright, but in connection with a license/ agreement under which it retained a certain control of the same,—thereby the said defendant NATIONAL PHONOGRAPH COMPANY keeps track of all phonographs and phonograph supplies put out by it, and becomes responsible for the presence of the same, and of any specimen of the same, within any territory.

And now your orator complains that, within the past six years and before the execution of this bill of complaint, the said NATIONAL PHONOGRAPH COMPANY and the said WILLIAM J. RAHLEY individually and as agent for the said NATIONAL PHONOGRAPH COMPANY, conspiring together have violated your orator's said exclusive rights, by using and causing to be used, selling and causing to be sold, and offering for sale and otherwise dealing in and handling phonographs and phonograph supplies, within the city of Baltimore aforesaid and elsewhere within your orator's said exclusive territory, and without your orator's consent, but contriving together to injure and defraud your orator, and to deprive it of the profits which it otherwise would obtain; that the said defendants still continue so to do, and are threatening and preparing to continue their aforesaid unlawful acts to a still greater extent; and that they have derived and received great gains and profits by reason of their unlawful acts herein complained of, but to what extent your orator is ignorant and therefore prays a discovery thereof.

And your orator further shows unto your Honors that this suit is a controversy between citizens of different States, the complainant being a citizen of the State of West Virginia, and the defendants being citizens of the State of New Jersey and Maryland, respectively; and that the matter in dispute exceeds, exclusive of interests and costs, the sum or value of Two thousand Dollars (\$2000.)

And your orator further shows that, inasmuch as the said NATIONAL PHONOGRAPH COMPANY is a foreign corporation, being a creation of the laws of the State of New Jersey, your orator may not be able to obtain service upon said defendant; and your orator therefore prays that, in such event, this cause may continue against the said WILLIAM J. RAHLEY, and that this Honorable Court will uphold your orator's rights in the premises against the said defendant WILLIAM J. RAHLEY.

Inasmuch as your orator can have no adequate relief save in this Honorable Court, it further prays:

(1) That these defendants and each of them may be restrained by a writ of injunction, issuing out of and under the seal of this Honorable Court, enjoining them and each of them and their attorneys, agents, servants, clerks, employees, dealers, associates, successors and assigns, from directly or indirectly using or causing to be used, or selling or causing to be sold, or letting or causing to be leased, or offering or causing to be offered for sale or to let, within the States of Maryland and Delaware and within the District of Columbia, any phonograph or phonograph supplies;

(2) That a preliminary injunction and also a temporary restraining order, to the same purport, tenor and effect as hereinbefore prayed for with regard to the perpetual injunction, may be issued in favor of your orator;

(3) That the said defendants and each of them may be compelled to account to your orator for their profits

obtained by their said unlawful acts, and that this Court may assess or cause to be assessed the damages likewise incurred by your orator, and will compel the defendants and each of them to pay to your orator not only the profits so accounted for but also the damages so assessed; and

(4) That these defendants may be ordered to pay the costs of this proceeding, and that your orator may have such other and further relief as the equity of the case may require.

To the end, therefore, that your orator may have the relief hereby prayed for and that these defendants may, if they can, show why your orator should not have such relief, and that they and each of them may make a full disclosure and discovery concerning all the matters hereinbefore alleged, and may full, true, direct and perfect answer make (answer under oath not being waived) to the best and utmost of their respective knowledges, informations, remembrances and beliefs, to the several allegations in this bill contained, in as full and particular a manner as if the same were repeated paragraph by paragraph and each of said defendants thereto severally and specifically interrogated,—may it please your Honors to grant to your orator the writ of subpoena ad respondendum, issuing out of and under the seal of this Honorable Court, and directed to said defendants, NATIONAL PHONOGRAPH COMPANY and WILLIAM J. RAHLEY and each of them, commanding them to appear and make answer to this bill of complaint and to perform and

abide by such orders and decrees herein as to this Court
may seem just.

And your orator will ever pray.

~~(Seal)~~ Corporate Seal

~~(Seal)~~

Columbia Phonograph Company,
by E. D. Easton, Pres't,

Attest:
~~(Seal)~~ Jas. G. Mitchell, Sec'y.

Same and Harmon
of Baltimore
and

~~(Seal)~~ Philip Mauro,
Elisha K. Camp,
Cal. Massie,

~~(Seal)~~ Philip Mauro,
Solicitor for complainant,
620 F Street N. W.,
Washington, D. C.

Of Counsel for Complainant.

STATE OF NEW YORK,
County of New York, SS.:

EDWARD D. EASTON, being first duly sworn, deposes
and says that he is President of the COLUMBIA PHONOGRAPH
COMPANY, named as complainant in the foregoing bill; that
he has read the same and knows the contents thereof, and
that the same is true of his own knowledge, save as to
the matters therein stated to be alleged upon information
and belief, and that as to those matters he believes it to
be true; and that the seal affixed to said bill is the
corporate seal of said complainant, and was by him affixed
to the bill by authority of said corporation.

~~(Seal)~~ Edward D. Easton.

Subscribed and sworn to before me
this 27th day of March 1901.

~~(Seal)~~ Elisha K. Camp,
Notary Public,
N. Y. Co.

True Copy

At: Jas. W. Chow, Clerk

Alexander Hardcastle, Jr.

Frank D. Wynn

*Law Offices
Hardcastle and Wynn,
Bank of Baltimore Building
No. 100 South St.*

Baltimore, Md. April, 3rd., 1901.

Howard W. Hayes, Esq.,
765 Broad St.,
Newark, N.J.

Dear Sir:-

The Columbia Phonograph Company docketed suit in the United States Circuit Court today against the National Phonograph Company, and William J. Rahley individually, and as agent of the National Phonograph Company.

As soon as the papers were left with the Clerk we were notified.

Judge Morris is out of Town, and the papers will not be served until his return on Friday or Saturday, so the Clerk informed us.

The Bill is for injunction, and they ask for preliminary injunction, and restraining order. With the Bill are filed affidavits by Easter, President of Columbia Phonograph Company, Brandt the Local manager, and the Assistant Local Manager.

Also copies of agreements between North American Phonograph Company, and Easter, and the decision of Judge Cox, in the United States Court for the District of Columbia. Shall we enter our appearance for the National Phonograph Company and William J. Rahley and admit service of papers?

You had better wire us instructions. We only had a few minutes to glance at the papers before the office closed for the day.

Yours very truly,

Hardcastle and Wynn

Dictated, -A.H.Jr.

W. E. GILMORE,
PRESIDENT & GENERAL MANAGER.

ADDRESS REPLY TO THIS COMMUNICATION TO ORANGE, N. J.

J. F. RANDOLPH,
SECRETARY & TREASURER.

NATIONAL PHONOGRAPH CO.

EDISON LABORATORY, ORANGE, N. J.

OFFICE AND SALESROOM.

1335 FIFTH AVENUE.

COR. OF 20TH STREET.

IN REPLYING TO THIS LETTER

PLEASE MENTION THESE INITIALS.

Orange, N. J.

Nov. 12, 1901.

Howard W. Hayes, Esq.,

Newark, N. J.

Dear Sir:

I have your two letters dated Nov. 8th, enclosing communications from Mr. Samuel R. Church, your correspondent at Washington, D.C., together with the opinion in the case of Whitson against the Columbia Phonograph Co. I discussed this quite fully with Mr. Edison yesterday and he immediately stated that of course we would go ahead with the case for a final hearing, which goes without saying.

As I have already stated to you over the telephone, the Whitson people are very weak indeed, and I do not see that it would be of any benefit to us to endeavor to make any arrangement with them for an indefinite period, so that your opinion, as to having them make their peace with the Columbia Phonograph Co. and arranging for a decree by consent, is fully approved by both Mr. Edison and ourselves.

Your suggestion, however, as to our sending a salesman, or even one of my people down to see them so as to make this arrangement, I do not consider hardly the thing. I think it would be far better if you would send Mr. Pelzer down to take care of this, as I feel certain that he could do it much better than if any of my people were to attempt to do it. This is on the lines already telephoned you and I trust you will act accordingly. I shall be glad to know the result, however.

I return you herewith the opinion which you enclosed, copy of

SHEET No. 2.

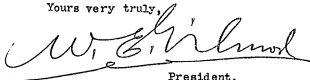
NATIONAL PHOTOCOPY CO. TO

H.W.

DATE,

letter from Mr. Church to Whitson Bros., dated Nov. 5th, also Mr.
Church's original letters to you dated Nov. 5th, 7th and 8th.

Yours very truly,


President.

WEG/IWW

Enc-

[FROM HOWARD W. HAYES]

Nov. 16, 1901.

William E. Gilmore, Esq.,
National Phonograph Company,
Orange, N.J.

Dear Sir:-

In re Whitson case.

Mr. Pelzer was at Washington yesterday and had an interview with the Whitsons in reference to dropping the suit. He advised them that the National Company did not care to pursue the case any further and that since the Whitsons were under an injunction and would remain so for an indefinite period pending the final disposition of the case with the possibility of the injunction being made permanent after final hearing, it would be best for them to accept the terms of the Columbia Company. He further urged them to do this at once since they are anxious to continue the business of handling talking machines, and in order to accomplish this, Mr. Pelzer advised them to arrange with the Columbia Company to enter a consent final decree, but to insist on a waiver of costs and damages. Mr. Pelzer also pointed out to them that this step could be taken in ^{the} ~~their~~ good faith and that they would still retain the good-will of the National Company. The Whitsons, however, refused to enter into the matter for the reason that, as they claim, the National Company has not acted in good faith with them and before doing anything would submit the matter to their own counsel.

Their position is this: At the time Mr. Gardner of your Company saw them in reference to handling the phonograph in Washington, they were handling the Columbia goods and as an inducement to entering

W.E.G. 8,

into a contract with the National Company, Mr. Gardner agreed on behalf of the National Company to re-imburse them for any loss they might incur through their failure to sell machines in case they should be tied up by suit, which it was well understood at the time, would be instituted immediately by the Columbia Company. They further state that they have been advised that immediately after their accepting the National Company's terms, Mr. Gardner communicated the fact to the Columbia people, whereupon they were interviewed by them with the result that the Columbia goods were taken out of their hands at once and immediate steps taken to bring suit. They further assert that there ~~was~~ ^{was} considerable delay in the filling of their order by the National Company and that they were unable to do any business to speak of before the injunction was issued against them, and of course have not done any business since. They further claim that before the decision of the lower Court was affirmed, they had a fairly good offer from the Columbia Company to handle their goods, but, of course, not as good an arrangement as they originally had; and now that the decision was affirmed, they feared that they would be unable to make any terms with the Columbia Company. So that on the whole their entering into a contract with the National Company has injured them to a considerable extent.

What they demand, therefore, is, that they be re-imbursed for the loss that they sustained. On behalf of the National Company Mr. Pelser insisted that he never heard of never knew of the National Company making any such agreement with a dealer, further than if suit was brought the Company would undertake the defence of the suit and

W.E.G. 3,

pay the direct costs, but under no circumstances ~~did we know of~~
~~the Company~~ ^{Whitson} the Company ~~is~~ guarantee a dealer against loss due to the bringing of a suit. They admitted, of course, that they had no agreement in writing, but that Mr. Gardner orally agreed to do this as an inducement ~~for them to~~ go into the business. After warning them that any delay in making their peace with the Columbia Company would be a loss to them and not to the National Company, the interview terminated with the understanding that the Whitsons would see their own counsel and subsequently submit a statement of what they consider to be the extent of their loss.

So far as the National Company is concerned, there is no need of taking any further steps in the matter until the time for arguing the demurrer which was filed against the bill. This matter will probably not come up until sometime in December.

Yours very truly,

Newark, N.J., April 17, 1902.

Messrs Harrogate & Wynn,
1 St. Paul Street,
Baltimore, Md.

Dear Sirs:-

Confirming my telegram of to-day, please make application to Judge Morris on behalf of Rahley to stay the injunction the pending appeal and state that you will take the appeal at once, perfect it as soon as possible, and argue it at the earliest possible day. It would be a good idea to present at the motion an affidavit from Rahley stating the volume of his business, making it as small as possible, but at the same time showing that as small as it is, it is of great importance to him because his other business is equally small and that without it he could not meet the expenses for rent, clerk hire etc., in his store. Also stating that he keeps accurate books of account and expects to continue to do so. Also stating that the Columbia Phonograph Company does not sell any phonographs and that therefore his selling them is no injury to that Company. I suggest this as a general line of procedure to show that it would be unjust to keep him shut up pending the appeal. I will prepare the appeal papers at once. In making this motion, it would be well to have it appear that you are doing it entirely for Rahley's benefit and not at the instance of the National Phonograph Company.

I think ~~xxx~~ a bond of \$1000. is sufficient, especially

H.S.W. 2,

as the Judge has fixed that as the amount Rahley would be damaged by the preliminary injunction if he succeeds at final hearing. The National Surety Company will give the bond and also will go on the \$500. bond necessary for the appeal. I will arrange with their representative here to instruct their representative there to sign the bonds when presented to him. I presume that they are authorized to do business in Maryland and are acceptable to the Court.

Yours very truly,

Nowark, N.J., April 19, 1902.

Messrs Hardcastle & Wynn,
1 St. Paul Street,
Baltimore, Md.

Dear Sirs:-

I beg to hand you appeal papers in the Rahley case. I have inserted the amount of the bond as \$500., which is the customary amount. I presume Judge Morris will fix it at that amount. Please fill in the date of the order. I have forgotten what the District number of your Circuit Court of Appeals is so I left that out and also the place where the Court sits. Those, of course, should be filled in.

Judge Morris fell into one very important mistake in his decision. He held that the National Phonograph Company is the successor of the North American Phonograph Company and is bound by its contracts. There is no evidence in support of that except the naked allegation of the bill. While on the other hand, our affidavits show conclusively that the National Phonograph has had nothing to do with the North American Phonograph Company and that all it ever did was to buy from the receiver a portion of the assets of the North American Company. I do not presume, however, that Judge Morris would be willing to have a re-hearing on that point. The legal effect of the purchase by one corporation of a portion of the assets of another at a receiver's sale, was not

considered or discussed at the hearing. I imagine that on account of the length of time that had elapsed between the argument and the decision the case had gotten out of Judge Morris' mind and in writing his decision he did not go through the long affidavits but took it for granted that the allegations of the bill were supported by proof. As soon as you ascertain the amount of the bond I will arrange to have the American Surety Company's representative in Baltimore sign it as surety.

Yours very truly,

Alexander Hardcastle, Jr.

Frank D. Wynn

*Law Office
Hardcastle and Wynn,
Bank of Baltimore Building
No. 1 N. Paul St.*

Baltimore, Md. April, 26th., 1902.

Howard W. Hayes, Esq.,
Newark, N.J.

Dear Sir:-

Judge Morris gave us a hearing this morning on the motion to, stay the injunction pending appeal. Mr. Cook appeared for the plaintiff and strenuously resisted the motion. The Judge was disposed to refuse the motion at first, but after we had called his notice to a number of things connected with the case, that seemed to have escaped him, he took the matter under advisement and promised to decide it on Monday morning.

We recalled to his attention particularly the contract made by the North American Phonograph Company with the Columbia Phonograph Company, wherein it is expressly stipulated, that Phonographs and Graphophones were both to be placed upon the market, and their sale pushed with equal vigor by the Columbia Phonograph Company. We will hear from the Judge on Monday and will then let you know the result.

The Judge showed very plainly this morning that he had been strongly influenced in his decision by the decision of the District of Columbia Court. Another thing, that sticks fast in his mind, is that the contracts expire next year.

We expected to need the bonds this morning and sent for the agent of the American Surety Company, he had a letter, which had been sent to Chicago, Illinois, by mistake, but in that letter he was instructed to ascertain what we would need, and then refer the matter to the home office. That is the reason we telegraphed you.

Alexander Hardcastle, Jr.

Frank D. Wynn

*Law Offices
Hardcastle and Wynn,
Bank of Baltimore Building,
No. 100 Paul St.*

H. W. H. #2.

Baltimore, Md. April, 26th., 1902.

If Judge Morris grants our motion, we will want to file the bond at once. In any event, we will need the bond for costs.

We told the agent here that he must get himself in shape by Monday morning at ten o'clock.

Yours very truly,

A.H.Jr./J.P.W.

Hardcastle and Wynn.

W. E. GILMORE,
PRESIDENT & GENERAL MANAGER.

J. F. RANDOLPH,
SECRETARY & TREASURER.

ADDRESS REPLY TO THIS COMMUNICATION TO ORANGE, N. J.

NATIONAL PHONOGRAPH CO.

EDISON LABORATORY, ORANGE, N. J.

OFFICE AND SALESDROOM.

IN REPLYING TO THIS LETTER

185-187TH AVENUE
NEW YORK CITY, N. Y.

PLEASE MENTION THESE INITIALS.

CHICAGO OFFICE

FORWARDED BY



Orange, N. J.

Dec. 16, 1902

Howard W. Hayes, Esq.,

Newark, N. J.

DEC 17 1902

Dear Sir:

One of the Whitson Bros. called in to see me about a week or ten days ago and made the statement that they are absolutely stopped from doing any business whatever and have been for a very long time. They asked me whether they would have to wait until the contract between the North American Phonograph Co. and the Columbia Phonograph Co. expires. I told them this was something that I was not at all familiar with but that I would communicate with you. They seem to be very much hurt from the fact that they have been unable to do any business during this Holiday season, but of course I talked to him very kindly and arranged to send them a phonograph outfit for their own use, etc., and so fixed it up. I should like to hear from you relative to this matter, however, immediately you get back.

Yours very truly,

W. E. Gilmore

WEG/IWW

President.

COLUMBIA PHONOGRAPH COMPANY
vs
NATIONAL PHONOGRAPH COMPANY
and WILLIAM J. RAHLEY, indi-
vidually and as agent of said
NATIONAL PHONOGRAPH COMPANY.

} IN THE CIRCUIT COURT OF THE
} UNITED STATES
} FOR THE DISTRICT OF MARYLAND.
} No. 51 Eq. "D".

DOCKET ENTRIES.

3 April 1901.	Bill of Complaint, Exhibit, Affidavits and Motion papers, filed.
6 April 1901.	Order of Court for hearing application for preliminary injunction on 19 April 1901; deft. to file affidavits in reply by 16 April, and plttf to file affidavits in rebuttal by 18 April, filed.
same day	Subpoena issued, Retble. 1 Monday in May next. Copy Bill of Complaint, Exhibit, Affidavits, Motion papers & Order for hearing sent with Spma. ("Summoned the National Phonograph Company by service on William J. Rahley, its Agent; and summoned William J. Rahley, individually and as Agent of the National Phonograph Company, and two copies of subpoena, & copy of Bill of Complaint, Exhibit, Affidavit, Motion papers and Order of Court left with him 8 April 1901")
16 April 1901.	Separate Affidavits of William J. Rahley, William F. Gilmore and Cassell Severance with accompanying exhibits marked respectively, Defendant's Exhibit 1 & 1 "A", Defendant's Exhibits 2, 2A, 2B & 2 C, Defendant's Exhibit 3, Defendant's Exhibit 4, Defendant's Exhibit 5 and Defendant's Exhibit 6, filed.
6 May 1901.	App. of Hardcastle & Wynn, for William J. Rahley, Order filed.
same day.	Special App. of Howard W. Hayes on behalf of National

	Phonograph Co. Order fd.
8 May 1901.	Mo. to strike out Marshal's return of summoning Natl. Phonograph Co. and Order (dated May 7, 1901) setting same for hearing on 25 May, filed. Copy sent. "Service admitted".
13 May 1901.	Affidavit of William J. Rahley in support of Mo. of Natl. Phonograph Co. to set aside the Marshal's return, filed.
same day.	Affidavit of William E. Gilmore in support of mo. to set aside service, filed.
same day	Affidavit of Philip Mauro and copy Agreement annexed on behalf of complainant, fd.
25 May 1901.	Affidavit of Howard W. Hayes, fd.
25 May 1901.	Order of Court striking out and setting aside return of Marshal so far as it returns the National Phonograph Company "summoned", filed.
3 June 1901.	Demurrer of William J. Rahley defendant to Bill of Complaint, filed.
26 June 1901.	Petition of Plaintiff and Order of Court thereon setting demurrer for hearing on 7 Oct. 1901, filed "Service admitted".
12 April 1902.	Opinion on application for a preliminary injunction filed.
21 April 1902.	Order of Court granting a preliminary injunction against William J. Rahley, filed.
26 April 1902.	Petition of William J. Rahley for allowance of an appeal from interlocutory order of 21 Apl. 1902; Assignment of Errors and Order of Court allowing an appeal as prayed and amt. of appeal bond fixed at \$500. fd.

same day.	Motion of defendant William J. Rahley to stay preliminary injunction, pending appeal, upon filing bond, filed.
same day	Affidavit of Wm. J. Rahley in support of mo. to stay prely injunction, fd.
28 April 1902.	Order of Court denying mo. of deft. Rahley to stay preliminary injunction pending appeal, filed.
30 April 1902.	Appeal Bond approved & filed.
same day	Citation issued Retble. 29 May 1902, "Service acknowledged".
28 May 1902.	Stipulation regarding record, fd.
same day.	Order of ^{the} Court extending time for filing record in U. S. Ct. Ct. of Appeals, filed.
27 June 1902.	Record transmitted to U. S. Ct. Ct. of Appeals.

UNITED STATES OF AMERICA,

DISTRICT OF MARYLAND, to wit:

I/ James W. Chew, Clerk of the Circuit Court of the United States for the District of Maryland, do hereby certify that the foregoing is a true copy of the Docket Entries, in the therein entitled case.

IN TESTIMONY WHEREOF I hereunto set my hand and affix the seal of said Circuit Court this 26th. day of February, 1903.

James W. Chew
Clerk of said Circuit Court.



MELVILLE CHURCH.

J. B. CHURCH.

A. S. STEWART.

PATENT CAUSES.

LAW OFFICES OF

CHURCH & CHURCH,

McGILL BUILDING,

908 G STREET N.W.

LONG DISTANCE TELEPHONE
MAIN 2145.

CABLE ADDRESS "CHURCH."
A. S. STEWART.

WASHINGTON, D. C. March 15, 1904.

Mr. Frank L. Dyer,
Edison Laboratory,
Orange, N.J.

My dear Mr. Dyer:-

I have carefully examined the record and
briefs in the case of Columbia Phonograph Co. vs. Whitson
et al..

I think the case was wrongly decided both by
Judge Bradley and by the Court of Appeals, but I doubt if by
a showing of mere affidavits we can now get a new Judge to
disturb the status quo.

It seems to me that it would be wise and entirely
safe to get an order limiting the times for taking testimony
and force the plaintiff to its proofs. If it fails to
make a prima facie case, as I believe it will, we can, if
we wish, then move to dissolve the injunction, without await-
ing the putting in of full proofs on our side.

The only point that we now have available that was
not fully or, at least, partially presented to Judge Bradley,
and to the Court of Appeals, is the expiration, by limitation,
of the rights of the Columbia Company, if any they ever had,
as against the National Co. If we raise the point on a
motion for dissolution of the injunction we will have to, in
effect, prove a negative; but if we require the plaintiff to

Dyer--2

go ahead with its prima facie case it will have to show affirmatively the extension of the license.

The case is a peculiar one and unless I am very much mistaken the Court will not disturb the present situation unless, upon full proofs, regularly taken, it shall appear that the plaintiff has not the rights that Judge Bradley thought it might have.

Yours truly,

EG

A handwritten signature in cursive script, appearing to read "Merrill Edmund", is written over a horizontal line.

MELVILLE CHURCH,
J. B. CHURCH,
—
A. B. STEWART.

PATENT CAUSES.

LAW OFFICES OF
CHURCH & CHURCH,

McGILL BUILDING,
908 G STREET N.W.

LONG DISTANCE TELEPHONE
Main 2146

Cable Address "CHURCH"
A. B. C. CODE 1080.

WASHINGTON, D. C.

April 7, 1904.

Mr. F. L. Dyer,
Edison Laboratory,
Orange, N.J.

Columbia Co. vs. Whitson, et al.

My dear Mr. Dyer:-

Yours of the 5th received. I enclose
copy of a letter received this morning from Mr. Mauro and
also a copy of my reply thereto. I see no reason why we should
not be prepared to proceed with the testimony upon reasonable
notice. Are there any stipulations that you are willing to
have me make? Why shouldn't I tell Mauro to go ahead and
prove his case in the usual way. I am not inclined to be
too easy in the matter of stipulations. Let me hear promptly
from you, if you please, as I wish to make Mr. Mauro a
definite answer.

Yours truly,

CA

Melville Church

[ENCLOSURE]

COPY.

Apr. 6, 1904.

Melville Church, Esq.,
McGill Bldg.,
City.

Dear Mr. Church:-

Columbia Phonograph Co. v. Whitson.

I have yours of the 5th inst. enclosing copy of the Order entered in this case, limiting and apportioning the time. I send you herewith copy of brief on appeal, as requested.

On reading the Bill and Answer, I see that the denials of the Defendant will make it necessary to prove a number of agreements, and other matters, which will necessitate the taking of proof in and near New York City. In order to get our proof in within the time limit, you must be prepared to attend, at short notice, sessions for taking testimony at such places.

Possibly we may, by stipulation, save expense and time in taking the proofs. I suggest that you decide on what points you wish to contest the case and advise me promptly what stipulations you can make. I am going to New York to-night and will, while there, make arrangements for taking testimony, so that it would be well if you could give this matter prompt attention.

Yours very truly,
PHILIP MAURO.

[ENCLOSURE]

April 7, 1904.

Philip Mauro, Esq.,
620 F St.,
City.

Columbia Phonograph Co. vs.
Whitson, et al.

My dear Mr. Mauro:-

Yours of the 6th instant received. I think we can attend at any time and place if you will give us reasonable notice. Just what stipulations we can make to shorten the proceedings I am not prepared, off-hand, to say. I will, however, promptly look into the matter and advise you. The probabilities are however that I shall desire to have you proceed in the usual way.

Very truly yours,

CA

Columbia Co. vs. Whitson et al

April 8th, 1904.

Melville Church, Esq.,
908 G Street,

Washington, D.C.

My dear Mr. Church:-

Your favor of the 7th inst. has been received in reference to this case, with copies of correspondence with Mr. Mouro. The defendants in this case are small dealers, and it is not particularly important whether the injunction continues against them or not. It is, however, important that the status of the Columbia Company should be definitely settled. For this reason, I think Mr. Mouro should make out his case without the assistance of stipulations from us, and suggest that you write him to this effect. I know more or less about his engagements and feel reasonably certain that nothing can be done by him personally until sometime next month.

Very truly yours,

ELD/ARK.

PHILIP MAURO.

S. T. CAMERON.
REEVE LEWIS.
C. A. L. HARRIS.

PHILIP MAURO,
COUNSELLOR AT LAW,

OFFICES: 620 F STREET, WASHINGTON, D. C.
277 BROADWAY, NEW YORK.
("BROADWAY CHAMBERS.")

CABLE ADDRESS:
"MAURO-WASHINGTON"
"PUBBAND-NEW YORK"
(LICENSE STANDARD CODE)
WASHINGTON, EAST 274
TELEPHONE: NEW YORK, 3286 FRANKLIN

NEW YORK, April 20, 1904.

Frank L. Dyer, Esq.,
Orange, N. J.

Dear Mr. Dyer:-

With reference to the suit of Columbia Phonograph Co. vs. Whitson, you have of course been advised of the order entered by stipulation to the effect that complainant should put in its prima facie proofs by May 15th. I find that owing to final hearings, testimony in the molded record suit, etc., it will be impossible for me to take the testimony within that time. I do not like to ask Mr. Church for an extension of the time, and in fact he is so new to the case that he does not understand the situation. I should like to have the time extended for at least thirty (30) days. One main reason why I ask this extension is that I want an opportunity of discussing this situation with you in person, as I believe it can be disposed of to the satisfaction of everybody without further litigation. When I come to Orange to cross-examine you in molded record case No. 1103 we can have a discussion of this case, as well as the Rahley case in Baltimore.

Yours very truly,

Dict.P:M.

Philip Mauro

Whitson, Rawley and Helm
cases.

April 29, 1904

Phillip Mauro, Esq.,
277 Broadway,
New York City.

Dear Mr. Mauro:-

In accordance with our understanding yesterday, I am just writing Mr. Hough who has charge of the several Helm cases in New York, to prepare orders to discontinue the suits, and when prepared, I will submit them to you for your approval.

If you will draw up corresponding orders in the Whitson and Rawley suits, providing specifically for a dissolution of the injunctions, I will approve them. The orders can then be filed in all the cases.

Your early attention to this matter will be appreciated, as I wish to make use of the dissolution of the injunctions in Washington and Baltimore at the argument of the New York Phonograph case, and for the same reason I wish you would write me a letter such as suggested by you yesterday, expressing as your opinion the expiration of the contract rights under the original Lippincott agreements on March 26, 1903. The understanding which I had from you yesterday, and which I now beg to confirm, is that neither your clients nor mine will seek hereafter to enforce any alleged rights

P.M. No.2

under the original Lippincott agreements, and that the territory
now occupied by the Columbia Company be open to us.

Yours very truly,

ELD/MM.

April 29, 1904

C. M. Hough, Esq.,
79 Wall Street,
New York City.

Dear Sir:-

I have just made an arrangement with Mr. Mauro, Counsel for the American Graphophone Company, under which he agrees to have the Whitson and Rawley cases discontinued and the injunctions against us in Washington and Baltimore dissolved, provided we discontinue the several Helm suits pending in New York and under your charge. If you will prepare the proper orders to have the Helm cases discontinued, I will submit the same to Mr. Mauro, and make the exchange with him.

The arrangement seems to me to be desirable, because the Helm cases were hopeless, and the lifting of the injunctions in Washington and Baltimore can be favorably commented upon at the argument in the New York case.

Yours very truly,

WLD/AM.

PHILIP MAURO.
—
S. T. CAMERON.
REEVE LEWIS.
G. A. L. MARRIS.

PHILIP MAURO,
COUNSELLOR AT LAW,
OFFICES: { 420 F STREET, WASHINGTON, D. C.
277 BROADWAY, NEW YORK.
("BROADWAY CHAMBERS.")

CABLE ADDRESS:
"MAURO-WASHINGTON"
"PUNARDO-NEW YORK"
(LICENSE STANDARD CODE)
TELEPHONE: { WASHINGTON, EAST 874
NEW YORK, DEED FRANKLIN

NEW YORK, May 5, 1904.

Frank L. Dyer, Esq.,
31 Nassau St., City.

Dear Sir:-



I have been unable before this to reply to your letter of April 29th with reference to the suits of the Columbia Pho. Co. against Rahley and the same against Whitson.

As I have stated to you orally, I am willing to discontinue these suits, but wish to have it distinctly understood that I regard the Columbia Pho. Co's license as having been in full force at the time the suits were begun. My reason for discontinuing the actions is that I cannot see clearly my way to establishing the continuance of the license after March 26, 1903. For this reason I am willing to discontinue the actions without costs.

I enclose herewith orders to this effect, which you can have entered.

Yours very truly,

Dict.P.M.

Philip Mauro

Columbia Co. vs. Whitson, et al.

May 6, 1904.

Melville Church, Esq.,

908 G - Street,

Washington, D. C.

Dear Mr. Church:-

Mr. Mauro spoke to me the other day about this case, and it was agreed that it should be discontinued. In sending me the enclosed order he says - "My reason for discontinuing the actions is that I cannot see clearly my way of establishing the continuance of the license after March 26, 1903".

Kindly sign the order as solicitor and have the same entered. In view of this termination of the case, my only surprise is that it was not done a year ago.

Yours very truly,

FLD/MM.

Enc.

MELVILLE CHURCH.
J. B. CHURCH.
—
A. S. STEVART.

PATENT CAUSES.

LAW OFFICES OF
CHURCH & CHURCH,
McGILL BUILDING,
958 G STREET N.W.
LONG DISTANCE TELEPHONE
Main 3145. CABLE ADDRESS "CHURCH."
A. B. C. CODE 15958.

WASHINGTON, D. C. May 7, 1904.

Mr. Frank L. Dyer,
C/o Edison Laboratory,
Orange, N.J.

My dear Mr. Dyer: COLUMBIA CO. vs. WHITSON ET AL

Yours of the 6th inst., enclosing form of order dismissing the bill in the above case, with Mr. Mauro's approval endorsed thereon, was received this morning. On Monday I will have the order entered. Am very glad indeed to learn that our scheme worked. It was a very much less expensive proceeding than to get up a lot of affidavits, and have a hearing, on an application to dissolve the injunction. I congratulate you upon the result..

Yours truly,

EG



P.S. I suppose Mr. Moore is still lucubrating.

May 9, 1904.

Columbia Co. vs. Whitson, et al.

Melville Church, Esq.,
908 G - Street,
Washington, D. C.

Dear Mr. Church:-

Your favor of the 7th inst. is received, and I note that you will have the order in the above case entered to-day. Your suggestion of limiting complainant's time for taking testimony was certainly much less expensive than my idea of having the injunction dissolved.

By the way, I am considering the practicability of securing a fraud order in the Post Office Dept. against a concern that is making a very unfair use of Mr. Edison's name. Would you care to help me out on such a case?

Yours very truly,

EJD/MM.

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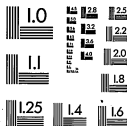
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